Supreme Court, U.S.
FILED

011786 JUN 5 2001

OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS D/B/A SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION,

Petitioner,

v.

ERNEST I. YOUNG,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

KEVIN J. MOODY (P34900)
Counsel of Record

LOUIS B. REINWASSER (P37757)
POLLY ANN SYNK (P63473)
MILLER, CANFIELD, PADDOCK & STONE, P.L.C.
ONE MICHIGAN AVENUE
SUITE 900
LANSING, MI 48933
(517) 487-2070

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

123pgs

QUESTIONS PRESENTED FOR REVIEW

Petitioner, the Sault Ste. Marie Tribe of Chippewa Indians d/b/a the Sault Ste. Marie Tribe Economic Development Commission (the "Tribe") entered into a Joint Venture Master Agreement ("JVMA") with Respondent Ernest Young ("Young") which contemplated the creation of a separate legal entity, Special Plastics Products, L.L.C. ("SPPLLC") that would enter into an employment agreement ("Employment Agreement") with Young, and would operate a plastic injection molding business. *The Tribe was never a party to the Employment Agreement.* The JVMA included an express waiver of the Tribe's sovereign immunity that permitted enforcement of an arbitration award in state court, but did not expressly permit application of any state law doctrines for extending liability to non-contractual parties, or for imposition of statutory judgment interest.

The specific questions presented to this Court arising from these circumstances are:

I. Did the Tribe waive its sovereign immunity such that it can be held liable for an alleged breach of the Employment Agreement—even though it was never a party to the Employment Agreement—based on state law doctrines extending liability to non-contractual parties?

II. Did the Tribe waive its sovereign immunity for the purpose of subjecting itself to Michigan's judgment interest statute even though it never expressly agreed to subject itself to the interest statute?

The larger question is:

In actions against sovereign Indian tribes, can state courts vitiate the federal law governing waivers of sovereign immunity, which requires such waivers to be express and unequivocal, by applying state law doctrines or statutes?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner, the Sault Ste. Marie Tribe of Chippewa Indians d/b/a the Sault Ste. Marie Tribe Economic Development Commission, is a federally-recognized, sovereign Indian tribe.

Respondent

Respondent, Ernest I. Young, is a natural person.

TABLE OF CONTENTS

Questions Presented for Review i

Parties to the Proceeding iii

Table of Contents iv

Table of Authorities viii

Citation to Opinions and Orders 1

Basis for Supreme Court Jurisdiction 1

Constitutional Provisions and Michigan Statutes Involved in the Case 1

Statement of the Case 2

I. The Relationship Of The Parties 2

II. The Failure Of The Business 3

III. The Arbitration 3

IV. Trial Court Proceedings 4

V. Court Of Appeals Proceedings 4

VI. The Michigan Supreme Court Declined To Accept The Appeal 4

VII. The Tribe Preserved The Issue Of Non-Waiver Of Sovereign Immunity . . . 5

A. Non-Waiver As It Relates To The Employment Agreement 5

B. Non-Waiver As It Relates To The Imposition Of State Law Statutory Judgment Interest 6

Arguments in Support of Petition 7

I. The Lower Courts' Decision To Allow Judgment To Be Entered Against The Tribe For Breach Of The Employment Agreement To Which It Was Not A Party Conflicts With Clear Precedent From This Court And Other Federal Courts Requiring Waivers Of Sovereign Immunity To Be Unequivocally Expressed, And, If Not Overturned, Will Permit State Courts, Relying On Purely State Law Doctrines, To Vitiate The Federal Law Requirement Of An Express and Unequivocal Waiver 7

A. Overview Of Tribal Sovereign Immunity 7

1. Only Congress And The Tribe May Waive The Tribe's Sovereign Immunity From Suit, And Any Waiver Must Be Explicit 8

2. The Tribe Did Not Waive Its Immunity From Suit For Any Claims Arising Under the Employment Agreement 9

3. The Federal Law Of Sovereign Immunity Has Been Vitiated 16

II. The Lower Courts' Decision To Allow Judgment Interest To Be Imposed Against The Tribe When The Tribe Did Not Waive Its Sovereign Immunity, Conflicts With Clear Precedent From This Court And Other Federal Courts 20

A. The State Courts' Application Of Statutory Interest Where There Has Been No Express Waiver For Such Interest, Dilutes And Compromises Federal Law Principles Governing Waivers Of Sovereign Immunity For Tribes And Other Governments 25

Conclusion 25

Appendix 1a

Appendix A - Michigan Supreme Court Opinion - 03/04/02 . . . . . 1a

Appendix B - Court of Appeals of Michigan Opinion - 05/11/01 . . . . . 3a

Appendix C - Oakland County Circuit Court Final Judgment - 08/12/98 . . . . . 15a

Appendix D - Oakland County Circuit Court Motions and Court's Ruling - 07/22/98 . . . . . 19a

Appendix E - American Arbitration Association Award of Arbitrators - 04/10/98 . . 31a

Appendix F - MCL 600.6013 . . . . . 34a

Appendix G - Respondent's Arbitration Brief . 35a

Appendix H - Brief in Support of Motion to Vacate or Modify Arbitration Award - 05/07/98 . . . . . 38a

Appendix I - Appellant's Brief on Appeal - 03/09/99 . . . . . 42a

Appendix J - Application for Leave to Appeal - 06/01/01 . . . . . 47a

Appendix K - Employment Agreement - 01/01/95 . . . . . 52a

Appendix L - Joint Venture Master Agreement - 12/15/94 . . . . . 67a

Appendix M - Tribal Code 78a

TABLE OF AUTHORITIES

Cases

Boston Sand & Gravel Co. v. United States,
278 U.S. 41 (1928) 22

Culver v. Castro, 126 Mich. App. 824,
338 N.W.2d 232 (1983) 11

Eastern Transp. Co. v. United States,
272 U.S. 675 (1927) 21

Florida Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida,
166 F.3d 1126 (11th Cir. 1999) 23

In re Greene, 980 F.2d 590 (9th Cir. 1992) 9

Jenkins v. U.S.A. Goods, Inc.,
912 F. Supp. 969 (E.D. Mich. 1996) 12

Kerr-McGee Corp. v. Navajo Tribe of Indians,
471 U.S. 195 (1985) 8

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.,
523 U.S. 751 (1998) 8, 16

Library of Congress v. Shaw,
478 U.S. 310 (1986) 21, 23, 24, 25

McMahon v. United States,
342 U.S. 25 (1951) 21

Montana v. Blackfeet Tribe of Indians,
471 U.S. 759 (1985) 18

Oklahoma Tax Comm'n v. Potawatomi Indian Tribe,
498 U.S. 505 (1991) 8, 9

Pan Am Co. v. Sycuan Band of Mission Indians,
884 F.2d 416 (9th Cir. 1989) 8

Puyallup Tribe Inc. v. Dep't of Game,
433 U.S. 165 (1977) 8

Richardson v. Mount Adams Furniture,
510 U.S. 1039 (1994) 9

Rosebud Sioux Tribe v. Val-U Constr. Co. of S.D., Inc.,
50 F.3d 560 (8th Cir. 1995) 9, 20

Ruckelshaus v. Sierra Club,
463 U.S. 680 (1983) 21

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978) 8, 9, 20

Sisseton-Wahpeton Sioux Tribe v. United States,
895 F.2d 588 (9th Cir.),
cert. denied, 498 U.S. 824 (1990) 9

Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Fla.,
177 F.3d 1212 (11th Cir. 1999) 9, 20

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g,
476 U.S. 877 (1986) 17, 25

United States v. James, 980 F.2d 1314 (9th Cir. 1992), *cert. denied*, 510 U.S. 838 (1993) 8

United States v. N.Y. Rayon Importing Co., 329 U.S. 654 (1947) 22

United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940) 8

United States v. Wheeler, 435 U.S. 313 (1978) 7, 9

Whittlesey v. Herbrand Co., 217 Mich. 625, 187 N.W. 279 (1922) . 12, 13, 14

Wichita and Affiliated Tribes of Oklahoma v. Hodel, 788 F.2d 765 (D.C. Cir. 1986) 23

Statutes

U.S. Const., art. I, § 8, cl. 3 . . . . . 1, 9

U.S. Const. art. VI, cl. 2 . . . . . 2, 9

28 U.S.C. § 1257(a) 1

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 USC § 2000e *et seq* 21

42 U.S.C. 2000e-16 24

MCL 600.6013 . . . . . 2, 4, 20

Petition

Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Michigan Court of Appeals, as well as the decision of the Michigan Supreme Court not to 1) grant leave to appeal and 2) reverse that judgment.

CITATION TO OPINIONS AND ORDERS

The decision of the Michigan Supreme Court from which this appeal is taken (App. to Pet. for Cert. p. 1a) is reported at 641 N.W.2d 857, 2002 Mich. LEXIS 244.

The Michigan Court of Appeals decision which the Michigan Supreme Court refused to consider is an unpublished decision in case number 214136 decided on May 11, 2002. (App. to Pet. for Cert. p. 3a)

BASIS FOR SUPREME COURT JURISDICTION

The judgment of the Michigan Supreme Court was entered on March 4, 2002. (App. to Pet. For Cert. p. 1a)

This Court has jurisdiction to review the judgment in question on a writ of certiorari pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND MICHIGAN STATUTES INVOLVED IN THE CASE

1. U.S. Const., art. I, § 8, cl. 3, that states in relevant part:

> The Congress shall have Power to...regulate Commerce with foreign Nations, and among

the several States, and with the Indian Tribes....

2. U.S. Const. art. VI, cl. 2, that states in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. Relevant excerpts from Michigan Compiled Laws ("MCL") 600.6013. (App. to Pet. for Cert. p. 34a)

STATEMENT OF THE CASE

I. The Relationship Of The Parties.

In 1994, Young approached the Tribe with the idea of forming a joint venture to take over the operation of his business, Special Plastic Products, Inc. ("SPP, Inc." or the "Corporation"), which manufactured plastic injection molded parts for the automotive industry. The plan proposed that the joint venture take the form of three limited liability companies to operate the business and hold the assets. Special Plastic Products, L.L.C. (SPPLLC), the only company formed pursuant to the plan which is pertinent to this Petition, was formed on December 15, 1994, when Young and the Corporation entered into the JVMA (*See*, App. to Pet. for Cert. pp. 67a-68a) with the Tribe. The JVMA provided that the Tribe would be a member of SPPLLC with a 50% ownership interest while the Corporation would also be a

member of SPPLLC with ownership of 50%. It also contemplated that Young would be hired by SPPLLC as its CEO, and in fact Young *and SPPLLC* did execute the Employment Agreement (App. To Pet. for Cert. p. 52a) as required by the JVMA. *However, Young was never employed in any manner by the Tribe.*

II. The Failure Of The Business

Under the guidance of Young, the business of the joint venturers sustained major losses, precipitating a financial crisis in the company. In early 1996, these major losses prompted a closer look at Young's performance as CEO. Given this and other relevant facts, the board of SPPLLC concluded that Young had been grossly negligent or reckless in the performance of his duties. Based on the overwhelming evidence, it was decided that Young's employment by SPPLLC should be terminated on September 5, 1996.

III. The Arbitration.

Young demanded arbitration of both an alleged breach of the JVMA (Young essentially alleged mismanagement of SPPLLC by the Tribe) and an alleged breach of his Employment Agreement. A hearing was held on January 21, 22, 23 and on February 4, 1998. On April 10, 1998, the arbitrators issued their award. (App. to Pet. for Cert. p. 31a) Young received a no-cause of action on his contention that the Tribe was somehow responsible for SPPLLC's demise. He was awarded the sum of $546,351.33, but only on his claim that his Employment Agreement had been breached. Not only was this award entered against Young's employer, SPPLLC, it was also entered jointly against the Tribe, even though the Tribe never employed Young for any purpose.

IV. Trial Court Proceedings.

The Tribe filed an action in Oakland County (Michigan) Circuit Court to vacate and/or modify the award, and also moved for summary disposition. Young brought a motion to confirm the award. The trial judge refused to dismiss the action and, over the objection of the Tribe, confirmed the arbitration award. *See*, Judgment dated August 12, 1998. (App. to Pet. for Cert. p. 15a) The trial court rejected Young's request for statutory judgment interest.

V. Court Of Appeals Proceedings.

The Tribe appealed the judgment confirming the arbitration award to the Michigan Court of Appeals. Young appealed the trial court's refusal to award statutory judgment interest. Without seriously addressing the issue of sovereign immunity, the appeals court held that the Tribe was liable for a breach of the Employment Agreement. The court further held that statutory judgment interest should be imposed pursuant to MCL 600.6013.

VI. The Michigan Supreme Court Declined To Accept The Appeal.

The Tribe filed a timely application for leave to appeal to the Michigan Supreme Court. The application sought leave to appeal the entire decision of the appeals court. Indicating that it was "not persuaded that the question presented should be reviewed by this Court," the Michigan Supreme Court denied leave to appeal on March 4, 2002. (*See*, App. to Pet. for Cert. p. 2a)

VII. The Tribe Preserved The Issue Of Non-Waiver Of Sovereign Immunity.

A. Non-Waiver As It Relates To The Employment Agreement.

The Tribe argued to the arbitrators, the trial court, the Michigan Court of Appeals, and the Michigan Supreme Court that it could not be held liable for a breach of the Employment Agreement, because, *inter alia*, it was not a party to the Employment Agreement and did not waive its sovereign immunity for any actions arising from that agreement. See:

1. Excerpt from the Tribe's Arbitration Brief (App. to Pet. for Cert. p. 35a);

2. Excerpt from the Tribe's Brief in Support of Motion to Vacate or Modify Arbitration Award (Oakland County Circuit Court) (App. to Pet. for Cert. p. 39a);

3. Excerpt from the Tribe's Brief on Appeal to the Michigan Court of Appeals (App. to Pet. for Cert. p. 42a); and

4. Excerpt from the Tribe's Application for Leave to Appeal to the Michigan Supreme Court. (App. to Pet. for Cert. p. 47a)

The Arbitrators did not expressly address the issue, but effectively rejected the Tribe's argument in their award. (*See*, App. to Pet. for Cert. p. 31a) The trial court also rejected the argument. (*See*, App. to Pet. for Cert. p. 15a), as did the appeals court. (*See*, App. to Pet. for Cert. p. 3a) The Michigan Supreme Court denied leave to appeal,

effectively rejecting the argument of the Tribe. (*See*, App. to Pet. for Cert. p. 1a)

B. Non-Waiver As It Relates To The Imposition Of State Law Statutory Judgment Interest.

The Tribe argued to the Michigan Supreme Court that it was not subject to statutory judgment interest because, *inter alia*, it did not waive its sovereign immunity for any actions seeking the imposition of statutory interest. (*See*, Excerpt from the Tribe's Application for Leave to Appeal to the Michigan Supreme Court, App. to Pet. for Cert. p. 51a)

In response to the Tribe's arguments on the issue of judgment interest, the trial court did not award any interest on the judgment. As the Tribe prevailed on the interest issue in the trial court, it did not raise it in the appeals court, although it did assert sovereign immunity in response to Young's arguments that interest should be awarded despite the decision of the trial court. The issue was first determined adversely to the Tribe by the appeals court. (*See*, App. to Pet. for Cert. p. 11a) The Michigan Supreme Court denied leave to appeal, effectively rejecting the argument of the Tribe. (*See*, App. to Pet. for Cert. p. 1a)

ARGUMENTS IN SUPPORT OF PETITION

I. The Lower Courts' Decision To Allow Judgment To Be Entered Against The Tribe For Breach Of The Employment Agreement To Which It Was Not A Party Conflicts With Clear Precedent From This Court And Other Federal Courts Requiring Waivers Of Sovereign Immunity To Be Unequivocally Expressed, And, If Not Overturned, Will Permit State Courts, Relying On Purely State Law Doctrines, To Vitiate The Federal Law Requirement Of An Express and Unequivocal Waiver.

A. Overview Of Tribal Sovereign Immunity.

The Tribe is a federally-recognized, sovereign Indian tribe. Indian tribes were self-governing before the coming of the Europeans, and today Indian tribes still possess the basic attributes of sovereignty. *United States v. Wheeler*, 435 U.S. 313, 323 (1978). This Court has explained that the sovereignty Indian tribes retain:

> ...is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Id. (citations omitted). In *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505 (1991) this Court held:

> A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court, and has been reaffirmed in a number of cases. Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes . . . Congress has consistently reiterated its approval of the immunity doctrine.

Id. at 510 (citations omitted). This doctrine has been reinforced time and again throughout American jurisprudence. *See also, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Puyallup Tribe Inc. v. Dep't of Game*, 433 U.S. 165, 172, (1977); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940); *see generally, Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985); *Pan Am Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416 (9th Cir. 1989); *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), *cert. denied*, 510 U.S. 838 (1993), *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998) (a recent reaffirmation of immunity for commercial off-reservation ventures.).

1. Only Congress And The Tribe May Waive The Tribe's Sovereign Immunity From Suit, And Any Waiver Must Be Explicit.

Under the United States Constitution, U.S. Const. art. I, § 8, cl. 3 (Indian commerce clause), and U.S. Const. art. VI, cl. 2 (supremacy clause), only Congress and the Tribe itself have the power to waive the Tribe's sovereign immunity. *Martinez*, 436 U.S. at 58; *Wheeler*, 435 U.S. at 323; *Potawatomi Indian Tribe*, 498 U.S. at 510. "It is settled that a waiver of [an Indian tribe's] sovereign immunity" "cannot be implied but must be unequivocally expressed." *Martinez*, 436 U.S. at 58; *accord, In re Greene*, 980 F.2d 590, 592 (9th Cir. 1992), *cert. denied, sub nom Richardson v. Mount Adams Furniture*, 510 U.S. 1039 (1994) (a waiver of sovereign immunity must be unequivocally expressed); *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 594 (9th Cir.), *cert. denied*, 498 U.S. 824 (1990). Simply stated, waivers of immunity will *not* be implied. *Martinez, supra.* The waiver of immunity to allow enforcement of an action through arbitration is not a waiver for other matters. *Rosebud Sioux Tribe v. Val-U Constr. Co. of S.D., Inc.*, 50 F.3d 560 (8th Cir. 1995); *Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212 (11th Cir. 1999).

2. The Tribe Did Not Waive Its Immunity From Suit For Any Claims Arising Under the Employment Agreement[1]

When the joint venture was formed, three agreements were executed — the JVMA, the Operating Agreement (not at issue here) and the Employment Agreement. The Tribe expressly waived its sovereign immunity for purposes of arbitration in both the JVMA and the Operating Agreement

---

[1] In the case at bar, there is no issue regarding whether Congress itself has waived the Tribe's sovereign immunity. It has not.

for claims arising out of those agreements. The Tribe did not, however, waive immunity in the Employment Agreement. Indeed, the Tribe was not even a party to the Employment Agreement and, therefore, is in no way subject to its provisions.

The express waiver of sovereign immunity in the JVMA unequivocally states:

> The [Tribe] EDC hereby waives immunity from suit to enforce the provisions of this Agreement, and all Agreements executed and delivered at the Closing and/or pursuant to this Agreement, and consents to the jurisdiction over such suit by any court which may have jurisdiction over the subject matter, *subject to the following conditions and limitations*:
>
> A. The waiver is granted solely to the parties, their representatives, agents, trustees, successors and assigns, and does not extend to third parties.
>
> B. The governing law shall be the law of the State of Michigan.
>
> C. The waiver shall extend only to the enforcement of the obligations of the EDC *under this Agreement* (including the agreement to arbitration), or to damages for breach of this Agreement by the EDC.

D. This waiver shall expire six years after the termination of the Company or successor entities.

E. The waiver shall be enforceable solely against the assets of the EDC, as provided in Sault Ste. Marie Tribal Code § 40.108(1). (Emphasis added.)

Young asserted and the lower courts found that the Employment Agreement was one of the agreements "delivered at Closing" and was therefore covered by the waiver of sovereign immunity.[2] However, even if the Employment Agreement was delivered at closing, there is still no basis for finding that the *Tribe* was a party to it and had any obligations under it that could be enforced.[3] To get around this obvious problem, the appeals court relied on a novel and somewhat perverted application of a state law doctrine which allows a court to *construe* contracts together. As explained by the appeals court:

---

[2] The Tribe contends that the "delivered at Closing" language is not material as it is subject to paragraph C. of the waiver that limits the waiver to the enforcement of the obligations of the Tribe set forth in the JVMA only.

[3] There are any number of agreements that may be "delivered" at a closing that would impose no enforceable obligations on the Tribe, e.g., title insurance commitments or policies, insurance policies, brokerage agreements, to name a few. Just because such agreements were delivered at closing does not mean that the Tribe waived sovereign immunity with respect to those agreements. Obviously, the intent of the waiver was to waive immunity with regard to those agreements *to which the Tribe was a party* and consequently had obligations.

Where one writing refers to another, the two shall be construed together. *Culver v. Castro*, 126 Mich. App. 824, 826, 338 N.W.2d 232, 234 (1983), *citing Whittlesey v. Herbrand Co.*, 217 Mich. 625, 628, 187 N.W. 279, 280 (1922); *see also Jenkins v. U.S.A. Goods, Inc.*, 912 F. Supp. 969, 971-972 (E.D. Mich. 1996) (where a promissory note was subject to the terms and conditions of a stock purchase agreement, and the stock purchase agreement included references to the promissory note and ancillary agreements, the stock purchase agreement, note, and ancillary documents "must be considered one agreement").

Under the plain language of the JVMA, that agreement is subject to the terms of the EA [Employment Agreement].

* * *

Further, § 13.5 of the EA states that "[t]his Agreement is one of the documents executed at the Closing as part of the transaction governed by the Joint Venture Master Agreement." Finally, as noted above, the immunity waiver in the JVMA specifically states that the Tribe EDC "waives its immunity from suit to enforce the provisions of [the JVMA], and all Agreements executed and delivered at Closing and/or pursuant to [the JVMA]...". The plain language of the JVMA thus demonstrates that the parties intended that the JVMA and other documents "executed and delivered at Closing," including the EA, be construed as one agreement. Accordingly, *a breach of the*

> *EA constitutes a breach of the JVMA*, the claim of breach was subject to arbitration under the terms of the JVMA, and the Tribe EDC could be held liable for the breach.

(App. to Pet. for Cert. pp. 7a-9a) (emphasis added).

The last sentence of this quote reveals the heart of the error promulgated by the appeals court. It is one thing, when divining the intention of the parties, to "construe" two contracts together where they reference each other. This doctrine merely aids in the interpretation of the contract language used by the parties. It absolutely does not follow, however, from this tenet of contract interpretation, that the *breach* of one contract is a *breach* of the other. This is a leap of logic of Olympic proportions. There is something seriously wrong with the law if it requires a party to one contract to arbitrate a claim arising under another contract *to which it is not a party*, merely because the contracts refer to each other.[4,5] The appeals court's decision is especially

---

[4] The appeals court does not even correctly apply Michigan law in this regard. The cases relied on by the appeals court do not stand for the proposition that a breach of one agreement referenced in another is a breach of that agreement, too, particularly where the two agreements are between different parties. *Whittlesey v. Herbrand Co.*, 217 Mich. 625, 187 N.W. 279, 280 (1922), the seminal case for this line of reasoning, is a good example. There, the plaintiff was employed by the defendant manufacturer as a salesman. The plaintiff entered into a contract with the defendant to receive a commission on certain parts which had been ordered by a third party. There was a dispute regarding how many parts were actually ordered by the third party, and the court permitted reference to the contract between defendant and the third party *to*

establish the intention of plaintiff and defendant when they entered into the commission contract. The court held that the two contracts must be construed together for the purpose of interpreting their meaning. It never said anything about the breach of one amounting to a breach of the other, and for good reason. Just as in the case at hand, the parties to the two agreements were not the same. The commission agreement was between the plaintiff and the defendant, while the contract providing for the sale of the parts was between the defendant and the third party purchaser. Under the appeals court's rationale in the case at hand, if the third party in *Whittlesey* had breached its agreement to buy the parts, the defendant, who was a party to both agreements, *would have had the right to sue the plaintiff for the breach*, even though the plaintiff was never a party to the contract with the third party. The absurdity of such a result is obvious in this context.

Another example makes this clear. In §12.6 of the JVMA, SPP, Inc. agreed to provide insurance coverage for all of the assets it was contributing to the joint venture. Assume SPP, Inc. did in fact obtain such insurance as it agreed. If there had been a subsequent fire that destroyed some or all of these assets and the insurance company refused in violation of its contract to reimburse SPPLLC for the losses, would the Tribe be able to make a claim against SPP, Inc. that it was responsible for the insurance company's breach? And more importantly, would any reasonable person contend that SPPLLC had agreed to arbitrate a claim that the insurance policy had been *breached by the insurance company*? Of course not. Yet this is precisely analogous to the claims made in the arbitration against the Tribe. Merely because it was recognized in the JVMA that SPPLLC and Young would enter into an agreement (just as it was recognized that SPP, Inc. and an insurance company would enter into an insurance contract) does not entitle a party to one of these contracts to look to a party to the JVMA for

satisfaction of a claim of breach of such contract.

What the lower courts and the arbitrators did was essentially make the Tribe the *guarantor* of SPPLLC's obligations under the Employment Agreement. Had this been the parties' intention, it would have been a simple matter to have the Tribe execute the Employment Agreement along with SPPLLC. Young never requested such a guaranty, and such a claim was never raised in the arbitration.

Moreover, there are no facts in the record which could possibly support the novel idea that the Tribe would somehow be responsible for the employment of Young by SPPLLC. The appeals court's conclusion that the agreements be treated as one is strained and is belied by the fact that there are separate agreements, with separate obligations and with separate parties. It completely re-created the relationship of the parties. The Loan Agreement, also referenced in § 9 of the JVMA, expressly stated that the Tribe would provide a loan. SPPLLC was a party to the Operating Agreement and the Employment Agreement, and the Tribe was not a party to the Employment Agreement. Why did the Loan Agreement and JVMA speak to the Tribe, but the Employment Agreement spoke to SPPLLC as the employer? Each player had differing obligations. Construing the agreements together takes this into account; treating them as "one agreement," such that everyone is responsible for everyone else's breaches, is purely a fiction.

[5] The trial court held:

> The Arbitration provision of the Master Agreement clearly provides that any controversy or claim arising out of or relating to this Agreement, or the breach of this Agreement, shall be resolved by arbitration. The Employment Agreement not only

egregious where the result of misapplying these rules is to vitiate clear and long-standing federal law requiring that the immunity possessed by sovereign Indian tribes can be waived only by an express and unequivocal act of the Tribe.

3. The Federal Law Of Sovereign Immunity Has Been Vitiated.

There are two problems with the decision of the appeals court. First, the court misconstrues state common-law contract interpretation principles to reach the absurd result that the Tribe breached the Employment Agreement to which it was not a party. More important, however, is the dangerous precedent set by this opinion which allows a state court to apply state law principles to circumvent the federal law of tribal sovereign immunity.

It is clear that the question of whether a tribe has waived sovereign immunity is a question of federal, not state, law. *Kiowa, supra*, 523 U.S. at 754, 756, 759 ("*As a matter of federal law*, an Indian tribe is subject to suit only where

---

> arises out of the Master Agreement, but is included as paragraph 9B of the Master Agreement. Therefore, pursuant to the terms of the Master Agreement, the Defendants agreed to arbitrate the Employment Agreement.

This rationale was not adopted by the Court of Appeals. The fallacy of the trial court's reasoning is obvious. Whether or not there was an agreement to arbitrate disputes under the Employment Agreement, the Tribe would have had to be a party to that agreement and have waived immunity before it could be required to arbitrate an alleged breach of its provisions.

Congress has authorized the suit or the tribe has waived its immunity...*It is a matter of federal law* and is not subject to diminution by the States...Like foreign sovereign immunity, tribal immunity *is a matter of federal law.*")(emphasis added). The practical effect of the Michigan courts' decisions below—which rely on state law doctrines not founded in the policy underlying the federal law of tribal sovereign immunity—is to vitiate the federal law requirement that waivers of sovereign immunity be express and unequivocal. That doctrine is rooted in the federal law concept that tribes should be self-governing, and that states cannot act in a way that effectively interferes with the tribe's right and ability to determine its own laws. *See, Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986) ("[B]oth the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes...our cases establish that 'absent governing Acts of Congress,' a State may not act in a manner that 'infringe[s] on the right of reservation Indians to make their own laws and be ruled by them'... The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance.").

The Michigan appeals court, besides clearly misapplying state law, never considered whether its decision to apply a waiver from one agreement to an alleged breach of an agreement to which the Tribe was not a party, would improperly infringe the Tribe's federally-mandated sovereign immunity. It cited not one federal decision or statute which suggests that a waiver can be extended to a breach of a contract to which a tribe is not a party. It relied only on a state law doctrine which it claimed permitted extension of the

waiver to the Employment Agreement.[6] Unlike the question of whether a contract has been breached, which a state court can decide based on state law doctrines even if a tribe which has unequivocally waived its immunity is involved, the question of whether there was a waiver of sovereign immunity cannot be determined on the basis of state law, but must be founded in uniform federal law principles.[7]

The Tribe is unaware of any federal decision where such an extension of a waiver to an agreement to which a tribe is not a party has been permitted. At the very least, the Michigan courts did not even purport to rely on federal Indian law principles, and it is therefore clear that these lower court decisions must be reversed. If not, they offer the potential of state courts across the nation subverting the doctrine of sovereign immunity entirely through application of state law doctrines, which are entirely within the control of the state's courts and legislatures.[8] Moreover, allowing states to decide

---

[6] As noted above, the Tribe contends that the appeals court incorrectly applied this state law doctrine.

[7] One such principle that the state courts here did not apply is that federal laws applicable to Indians should be construed in favor of the Indians. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("...statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit...") Although this doctrine has arisen in the context of federal statutes, as well as treaty interpretations, the Tribe is unaware of any reason why it should not apply to the federal law governing waivers of sovereign immunity. Implying a waiver of sovereign immunity where none existed clearly frustrates this policy.

[8] Given the ability of state courts to create their own common law, or misconstrue such law as the Michigan courts did here, there

when and where a tribe has waived its immunity presents the possibility that a different law will pertain in each state. Given the clear supremacy of federal law in this area, any potential trend of state courts diluting the doctrine of sovereign immunity based on state law doctrines should be "nipped in the bud" immediately. Granting Petitioner's petition would provide the Court the opportunity to give direction to the states before the trend has advanced beyond its infancy in Michigan.[9]

---

is no practical limit on the mischief state courts could cause Indian tribes if such courts are not required to adhere to federal principles governing waivers of sovereign immunity.

[9] Another example of a state law doctrine which could be used to frustrate federal policy governing waivers of sovereign immunity was relied on by Young below. Although he did not raise the issue in his arbitration claim, on the first day of the arbitration, Young contended that the "corporate veil" should be "pierced" so that the Tribe could be found liable for the alleged breach of the Employment Agreement. It seems (though not expressed in the arbitrators' decision) that this was the basis for the arbitrators' award against the Tribe. Neither the trial court nor the appeals court adopted this argument. (*See*, App. to Pet. for Cert. pp. 15a and 3a) The Tribe consistently argued that the state law doctrine of piercing the corporate veil could not be used to skirt federal law requirements that a waiver of sovereign immunity must be express and unequivocal. The arguments applied in this Petition to the appeals courts' analysis are equally applicable to the contention that the Tribe should be liable for breaches of the Employment Agreement based on the state law doctrine of piercing the corporate veil.

II. The Lower Courts' Decision To Allow Judgment Interest To Be Imposed Against The Tribe When The Tribe Did Not Waive Its Sovereign Immunity, Conflicts With Clear Precedent From This Court And Other Federal Courts.

Young contended that he is entitled to interest pursuant to the provisions of MCL 600.6013, which allows imposition of interest on certain judgments. (App. to Pet. for Cert. p. 34a.) However, as noted above, the Tribe is a sovereign Indian nation which is protected from legal actions, unless it has expressly and unequivocally agreed to them through an explicit waiver of its sovereign immunity. As previously set forth, although the Tribe expressly waived its sovereign immunity to permit enforcement of the terms of certain arbitration awards rendered in accordance with the JVMA, it did not waive its immunity from any action to enforce the interest provisions of MCL 600.6013 and cannot be subject to this statute. The Tribe advanced this argument before the Michigan Court of Appeals. Without citing a single federal precedent, the appeals court made the insupportable holding that a waiver to "enforce" the JVMA somehow meant statutory interest could be imposed on the Employment Agreement award. This reasoning deviates one hundred eighty degrees from the requirement that a waiver be explicit, clear and unequivocal. *Martinez*, 436 U.S. at 58.

Federal case law makes it clear that a waiver of immunity for purposes of arbitration, including suits to enforce arbitration, does *not* constitute a waiver for any other purpose. *See*, *Rosebud Sioux, supra; Tamiami Partners, supra*. As with the question of whether a state court can apply state common law principles to expand a waiver of sovereign immunity, a state court decision permitting interest to be imposed on a judgment confirming an arbitration award

sets a precedent that state legislatures and courts can vitiate the federal law requirement that waivers of sovereign immunity be express and unequivocal. The breadth of the waiver allowing enforcement of an arbitration award is an issue of great significance and should be addressed in this context by this Court.

In a directly analogous situation, this Court has ruled that interest of any kind cannot be added to a judgment against the United States, unless it has expressly waived its sovereign immunity from an award of such interest. In *Library of Congress v. Shaw*, 478 U.S. 310 (1986), the lower court awarded interest and attorney's fees to a plaintiff who had prevailed on a suit brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 USC § 2000e *et seq.* (the "CRA"). The U.S. Court of Appeals believed that interest could be awarded because the CRA provided that the United States would be liable "for costs the same as a private person." *Id.* at 313. This Court determined, however, that the CRA did not constitute a waiver of sovereign immunity such that a claim for interest on the judgment would be permitted. This Court noted:

> In analyzing whether Congress has waived the immunity of the United States, we must construe waivers strictly in favor of the sovereign, *see McMahon v. United States*, 342 U.S. 25, 27 (1951), and not enlarge the waiver "'beyond what the language requires,'" *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-686, (1983), quoting *Eastern Transp. Co. v. United States*, 272 U.S. 675, 686 (1927). The no-interest rule provides an added gloss of strictness upon these usual rules.

"[T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed." *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654 at 659.

A

When Congress has intended to waive the United States' immunity with respect to interest, it has done so expressly; (footnote omitted) thus, waivers of sovereign immunity to suit must be read against the backdrop of the no-interest rule. Yet respondent contends that by equating the United States' liability to that of a private party, Congress waived the Government's immunity from interest. We do not agree. *See ,Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 49 (1928).

[6] Title VII's provision making the United States liable "the same as a private person" waives the Government's immunity from attorney's fees, but not interest. The statute, as well as its legislative history, contains no reference to interest. This congressional silence does not permit us to

> read the provision as the requisite waiver of the Government's immunity with respect to interest.

Shaw, supra, at 318-319.

Likewise, in the case at hand, the Tribe cannot be subject to judgment interest absent an express and unequivocal waiver for such interest. The cases have uniformly treated tribal sovereign immunity just like the immunity of the United States, *see, Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 773 (D.C. Cir. 1986) ("An Indian tribe's immunity is co-extensive with the United States' immunity..."); *Florida Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1131 (11th Cir. 1999) ("[T]he same standard applies in determining whether Congress has abolished federal and state governments' protection from suit."), and have required express and unequivocal waivers before permitting lawsuits against such tribes. There is no legitimate reason why the "no-interest" rule, which is based solely on the United States' sovereign immunity, should not also apply to Native American Tribes, who enjoy the same immunity.

Here, the Tribe has not expressly and unequivocally waived its right to be free from claims for judgment interest. The Michigan Court of Appeals believed that language in the JVMA that extended the waiver of sovereign immunity to the enforcement of the Tribe's obligations under that agreement was sufficient to effect a waiver. However, there is no mention in this waiver of any intention to permit claims for judgment interest. The waiver only extends "to the enforcement of the obligations of the EDC under" the JVMA or to "damages". Such enforcement could mean many things, depending on the obligation that was sought to be enforced,

but it does not mean that statutory judgment interest is to be awarded a plaintiff, quite simply, because such interest is never mentioned in the waiver. If the Tribe had wanted to waive its immunity from such interest claims, it could have done so, just as it is clear that the United States can do so if it expressly mentions judgment interest in the applicable statute. *Shaw, supra,* at 318 n. 6.[10] What the Michigan Court of Appeals has done here is *imply* from the use of the word "enforce" that the Tribe waived its immunity to interest claims. However, as noted in *Shaw*, such waivers cannot be made by implication, and any language suggesting a waiver must be strictly construed.[11] *Shaw* goes so far as to hold that even if there was an *intention* to waive, unless it is unequivocally expressed in the language, even the intention cannot be honored. When this very strict standard is applied to the case at hand, it is readily apparent that the lower courts have committed a clear error of law.

---

[10] Subsequent to the decision in *Shaw*, Congress amended the CRA to expressly permit the addition of interest to judgments entered against the United States. *See*, 42 U.S.C. 2000e-16.

[11] In *Shaw*, this Court refused to imply a waiver for interest even though the CRA permitted an award against the United States "for costs the same as a private person." *Shaw* at 318. If permitting the imposition of costs is insufficient to express a waiver that permits the imposition of interest, certainly merely permitting "enforcement" of an arbitration award in court is likewise insufficient to accomplish a waiver such that interest may be awarded, especially where the waiver of sovereign immunity only permits enforcement of an arbitration award for "damages," not judgment interest.

A. The State Courts' Application Of Statutory Interest Where There Has Been No Express Waiver For Such Interest, Dilutes And Compromises Federal Law Principles Governing Waivers Of Sovereign Immunity For Tribes And Other Governments.

Just as with the state courts' indifference to federal law principles governing waivers of sovereign immunity relevant to the issue of the breach of the Employment Agreement, the imposition of statutory judgment interest by those courts has wider implications, both for Indian tribes and for other governments entitled to sovereign immunity. Statutory judgment interest is a creature entirely of state law, and can be imposed or modified at the whim of the state courts and legislatures. Allowing such a creature to impact a sovereign unless it is clear that the sovereign was expressly agreeable to being subject to the state law, could lead to other and more onerous laws being passed by states, possibly even laws targeted specifically at sovereigns. *See, e.g., Wold Eng'g, supra*. The Michigan courts' error should be addressed (and corrected) by this Court as it is significant to federal jurisprudence, just as the question of waiver under the CRA was sufficiently significant that this Court granted leave in *Shaw* to correct the errors of the lower courts.

CONCLUSION

As set forth above, there are several issues presented in this application which are of critical importance to federal law, both Indian law and the general law of sovereign immunity. The Tribe therefore respectfully requests that this Court grant its Petition and, thereupon, reverse the lower courts and vacate the arbitration decision to the extent it awarded damages to Young against the Tribe. In the

alternative, Petitioner requests that this case be remanded to the Michigan Supreme Court with direction to consider the issues raised in Petitioner's Application for Leave to Appeal to that court.

Respectfully submitted,

Kevin J. Moody (P34900)
Counsel of Record
MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
Louis B. Reinwasser (P37757)
Polly Ann Synk (P63473)
One Michigan Avenue, Suite 900
Lansing, MI 48933
(517) 487-2070

APPENDIX A

SUPREME COURT OF MICHIGAN

No. 119364

[Filed March 4, 2002]

ERNEST I. YOUNG and SPP, INC.,
Plaintiffs-Appellees,

v.

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS d/b/a SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION, SPECIAL PLASTIC PRODUCTS, L.L.C., SPECIAL PRODUCTS ENGINEERING, L.L.C. and NAB GROUP, L.L.C.,
Defendants-Appellants.

On Appeal From
State of Michigan Court of Appeals
No. 214136
Before Collins, P.J., and Jansen and Whitbeck, JJ.

OPINION

On order of the Court, the application for leave to appeal from the May 11, 2001 decision of the Court of

Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

APPENDIX B

COURT OF APPEALS OF MICHIGAN

No. 214136

[Filed May 11, 2001]

ERNEST I. YOUNG and SPP, INC.,
Plaintiffs-Appellees/Cross-Appellants,

v.

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, d/b/a SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION, and SPECIAL PLASTIC PRODUCTS, L.L.C.,
Defendants-Appellants/Cross-Appellees,

and

SPECIAL PRODUCTS ENGINEERING, L.L.C., and NAB GROUP, L.L.C.,
Defendants.

On Appeal From
Oakland Circuit Court
LC No. 98-003943-CZ
Judge Denise Langford Morris

JUDGES: Collins, P.J., and Jansen and Whitbeck, JJ.

OPINION

PER CURIAM

Defendants Sault Ste. Marie Tribe of Chippewa Indians and Special Plastic Products, L.L.C. appeal as of right the circuit court's confirmation of an arbitration award in favor of plaintiffs. On cross-appeal, plaintiffs challenge the circuit court's denial of statutory interest on the arbitration award. We affirm in part, reverse in part, and remand.

Plaintiffs and defendant Sault Ste. Marie Tribe of Chippewa Indians, d/b/a Sault Ste. Marie Economic Development Commission ("the Tribe EDC") entered into a joint venture to manufacture and supply plastic parts to the automotive industry pursuant to a Joint Venture Master Agreement (the "JVMA"). As a result of the joint venture, defendant Special Plastic Products, L.L.C. ("the LLC") was formed. Pursuant to an employment agreement ("the EA"), plaintiff Ernest I. Young became the chief executive officer of the LLC. After a period of time the LLC began experiencing financial difficulties and the managing board of the LLC terminated Young's employment. Young filed an arbitration claim seeking arbitration of, among other things, an alleged breach of the EA. The arbitrators awarded Young $ 546,351.33 against defendants the Tribe EDC and the LLC. The circuit court subsequently entered a judgment confirming the arbitration award.

Defendants argue on appeal that the circuit court erred when it confirmed the arbitration award because the arbitrators exceeded their authority when they entered the award against the Tribe EDC on Young's employment claim. Judicial review of an arbitration award is limited. *Dick v*

Dick, 210 Mich App 576, 589; 534 NW2d 185 (1995). In determining whether the arbitrators exceeded their authority in issuing an award, "a reviewing court's ability to review an award is restricted to cases in which an error of law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agree will constitute the record." *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 175-176; 550 NW2d 608 (1996), citing *Detroit Automobile Inter-Ins Exchange (DAIIE) v Gavin*, 416 Mich 407, 428-429; 331 NW2d 418 (1982). Because the arbitrators' power arises from the parties' arbitration agreement, the arbitrators exceed their authority when "they act beyond the material terms of the contract from which they primarily draw their authority or in contravention of controlling principles of law." *Dohanyos, supra* at 176. Interpretation of the written contract is left to the arbitrators. *Konal v Forlini*, 235 Mich App 69, 75; 596 NW2d 630 (1999). Claims that the arbitrator made a factual error are beyond the scope of appellate review. *Id.*

Defendants acknowledge that the JVMA, which was signed by the Tribe EDC, contains an arbitration provision and a waiver of sovereign immunity,[1] but contend that the

---

[1] Those provisions, in pertinent part, are as follows:

14.2 Arbitration.

(a) Any controversy or claim arising out of or relating to this Agreement, or the breach of this Agreement, shall be resolved by arbitration administered by the office of the American Arbitration Association located in Oakland County, Michigan, in accordance with its then current commercial arbitration rules. Except as

arbitrators did not have the authority to decide whether the Tribe EDC breached the EA because the Tribe EDC did not sign the EA and thus was not a party to that agreement. We

---

provided in sub. (b), arbitration shall be the exclusive remedy of the parties. Judgment upon the award rendered by the arbitration may be entered in any court having jurisdiction.

* * *

14.3 Waiver of Sovereign Immunity and Consent to Suit.

The EDC hereby waives its immunity from suit to enforce the provisions of this Agreement, *and all Agreements executed and delivered at the Closing and/or pursuant to this Agreement*, and consents to the exercise of jurisdiction over such suit by any court which may have jurisdiction over the subject matter, subject to the following conditions and limitations:

(a) the waiver is granted solely to the parties and the Companies, their representatives, agents, trustees, successors, and assigns, and does not extend to third parties;

(b) the governing law shall be the law of the State of Michigan;

(c) the waiver shall extend only to the enforcement of the obligations of the EDC under this Agreement (including the agreement to arbitration), or to damages for breach of this Agreement by the EDC;

(d) this waiver shall expire six years after the termination of the Companies or successor entities; and

(e) the waiver shall be enforceable solely against the assets of the EDC, as provided in Sault Ste. Marie Tribal Code § 40.108.1. [Emphasis added.]

conclude that this argument is not supported by the express terms of the JVMA and the EA. Where one writing refers to another, the two shall be construed together. *Culver v Castro*, 126 Mich App 824, 826; 338 NW2d 232 (1983), citing *Whittlesey v Herbrand Co*, 217 Mich 625, 628; 187 NW 279 (1922);[2] see also *Jenkins v USA Goods, Inc*, 912 F Supp 969, 971-972 (ED Mich, 1996) (where a promissory note was subject to the terms and conditions of a stock purchase agreement, and the stock purchase agreement included references to the promissory note and ancillary agreements, the stock purchase agreement, note, and ancillary documents "must be considered one agreement").

Under the plain language of the JVMA, that agreement is subject to the terms of the EA. Section 9 of the JVMA states in pertinent part as follows:

> **Implementation.** The promises and agreements of the parties are further conditioned upon and *subject to the terms and provisions* of the following documents to be executed and delivered at Closing:

---

[2] The Supreme Court noted in *Forge v Smith*, 458 Mich 198, 207 n 21; 580 NW2d 876 (1998):

In *Whittlesey v Herbrand Co*, 217 Mich 625, 628; 187 NW 279 (1922), quoting *Short v Van Dyke*, 50 Minn 286; 52 NW 643 (1892), the Court stated that "'in a written contract a reference to another writing, if the reference be such as to show that it is made for the purpose of making such writing a part of the contract, is to be taken as a part of it just as though its content had been repeated in the contract.'"

* * *

> **B. Young Employment Agreement.** Young shall be employed as Chief Executive Officer of each of the Companies for at least a five year term, under the direction and supervision of their respective Management Boards, at compensation of $ 145,000 per year plus benefits, bonus of 2% for gross sales exceeding $ 12,500.00 in 1995, and for 1996 and thereafter 2% of the amount by which the year's gross sales exceeded the previous year's gross sales, plus expenses, *and upon the other conditions stated in an Employment Agreement*. [Emphasis added.]

Further, § 13.5 of the EA states that "[t]his Agreement is one of the documents executed at the Closing as part of the transaction governed by the Joint Venture Master Agreement." Finally, as noted above, the immunity waiver in the JVMA specifically states that the Tribe EDC "waives its immunity from suit to enforce the provisions of [the JVMA], and all Agreements executed and delivered at Closing and/or pursuant to [the JVMA] . . . ." The plain language of the JVMA thus demonstrates that the parties intended that the JVMA and other documents "executed and delivered at Closing," including the EA, be construed as one agreement.[3]

---

[3] We find unpersuasive defendants' analogy to the insurance requirement in § 12.6 of the JVMA. The JVMA was not made subject to the terms and provisions of any insurance contracts required by that agreement, and insurance documents are not identified as documents to be executed and delivered at closing under § 9 of the JVMA.

Accordingly, a breach of the EA constitutes a breach of the JVMA, the claim of breach was subject to arbitration under the terms of the JVMA, and the Tribe EDC could be held liable for the breach.[4]

Defendants further argue that even if the Tribe EDC was subject to arbitration of Young's employment claim, the arbitrators exceeded their authority and erred as a matter of law in finding that defendants breached the EA. Defendants contend specifically that under the terms of the EA, the LLC was entitled to terminate Young because he was disabled and because he failed to perform his obligations as chief executive officer in good faith. Because this argument challenges the factual findings of the arbitrators, however, it is beyond the scope of our review. *Konal, supra* at 75.

We conclude that the arbitrators did not exceed their authority when they issued the arbitration award against the Tribe EDC for breach of the EA. Thus, the circuit court did not err in confirming the arbitration award.

Plaintiffs argue on cross-appeal that the circuit court erred in refusing to include in the judgment entered an award of statutory interest from the date the arbitration award was issued through the date the judgment entered on the award is satisfied, pursuant to MCL 600.6013; MSA 27A.6013. We review a trial court's ruling concerning the award of statutory interest under MCL 600.6013; MSA 27A.6013 de novo.

---

[4] Because we conclude that under the terms of the JVMA and EA, the Tribe EDC agreed to submit employment disputes to arbitration, we need not address whether the arbitrators could find the Tribe EDC liable under a veil-piercing theory.

Everett v Nickola, 234 Mich App 632, 638; 599 NW2d 732 (1999).

In refusing to award postaward and postjudgment interest, the circuit court noted that the arbitrators had included interest in the arbitration award. It is well-settled that the issue of *preaward* interest is a matter solely within the arbitrators' discretion. *Holloway Construction Co v Oakland Co Bd of Co Rd Comm'rs*, 450 Mich 608, 618; 543 NW2d 923 (1996); see also *Gordon Sel-Way, Inc v Spence Bros, Inc,* 438 Mich 488, 501; 475 NW2d 704 (1991). However, "postaward, prejudgment interest and postjudgment interest under § 6013(1) are statutorily required." *Holloway Construction, supra.* Therefore, the circuit court should have granted plaintiffs' request for statutory interest pursuant to MCL 600.6013; MSA 27A.6013.[5]

---

[5] We thus reject defendants' argument that under the Supreme Court's peremptory order in *Wiselogle v Michigan Mutual Ins Co*, 453 Mich 978; 557 NW2d 316 (1996), plaintiffs are not entitled to interest because interest is an element of damages properly determined by the arbitrators, not the courts. We conclude that this order is not controlling with regard to the issue before this Court because the scope of the order is uncertain given the authority cited. See *Brooks v Engine Power Components, Inc*, 241 Mich App 56, 61-62; 613 NW2d 733 (2000) ("Supreme Court peremptory orders are binding precedent when they can be understood."). Neither *Gordon Sel-Way, supra* nor *Holloway Construction, supra* state that postcomplaint interest is to be determined by the arbitrators. Rather, as discussed above, those cases make clear that the determination of any preaward interest is for the arbitrators, but postaward statutory interest is determined by the court.

We reject defendants' argument that its waiver of sovereign immunity, even if it applies to claims of breach of the EA, does not apply to awards of postaward and postjudgment statutory interest. As noted above, the JVMA states that the law of Michigan governs the Tribe EDC's waiver of sovereign immunity and that the waiver extends to *the enforcement* of the Tribe EDC's obligations under the JVMA. Again, under the laws of Michigan, statutory interest is mandatory in civil actions seeking confirmation of an arbitration award. *Holloway Construction, supra.* Accordingly, the Tribe EDC's waiver of sovereign immunity extends to an award of statutory interest.

We likewise reject defendants' argument that plaintiffs are not entitled to any postaward interest because they filed their complaint seeking confirmation of the arbitration award before the award was made. While the filing was premature, the circuit court entered the judgment nonetheless, as allowed by MCR 3.602(I).[6] Further, there is not, as defendants contend, a danger that application of MCL 600.6013; MSA 27A.6013 will result in double recovery, as preaward interest is determined solely by the arbitrators and § 6013 applies only to postaward interest. *Holloway Construction, supra.* Plaintiffs are, therefore, entitled to an award of statutory interest from the date the award was issued until the judgment is satisfied.

Plaintiffs' last argument on cross-appeal is that they are entitled to the twelve percent interest provided for in

---

[6] Defendants do not raise in their appeal the issue whether, given the premature filing, the lower court had jurisdiction to enter judgment on the award.

MCL 600.6013(5); MSA 27A.6013(5) because the arbitration award was rendered on a written instrument, i.e., the EA. Defendants contend that if plaintiffs are entitled to interest, they are entitled only to the variable rate provided for in MCL 600.6013(6); MSA 27A.6013(6) because the judgment at issue was not rendered on a written instrument but was entered on a complaint to confirm an arbitration award.

MCL 600.6013 ; MSA 27A.6013 provides in pertinent part:

> (5) For complaints filed on or after January 1, 1987, if a judgment is rendered on a written instrument, interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year, compounded annually, unless the instrument has a higher rate of interest. In that case, interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.
>
> (6) Except as otherwise provided in subsection (5) . . . , for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action shall be calculated at 6-month intervals from the date of filing the complaint at a rate of interest that is equal to 1% plus the average interest rate paid at auctions of 5-year United States

> treasury note during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, pursuant to this section.

In *Yaldo v North Pointe Ins Co*, 457 Mich 341, 350; 578 NW2d 274 (1998), the Supreme Court held that an insurance contract is a "written instrument" for purposes of determining postcomplaint interest pursuant to MCL 600.6013; MSA 27A.6013; thus, interest on the judgment rendered on that contract was properly determined under § 6013(5). The Court concluded that at least one reason for awarding a fixed rate of interest to judgments on written instruments, as opposed to a fluctuating interest rate on judgments in other civil actions, is a preexisting relationship between the parties before a controversy arises. *Id.*; see also *Everett, supra* at 639 (where a written instrument existed and governed the parties' relationship, plaintiff entitled to interest under § 6013[5]).

Here, the parties' relationship clearly was governed by a written contract, and the arbitrators found defendants liable for breach of that contract. Although technically the judgment was *entered* pursuant to a complaint seeking confirmation of an arbitration award, the arbitration award that served as the basis for the judgment was rendered on a written instrument. Indeed, § 14.2 of the JVMA provides that "judgment upon the award rendered by the arbitration may be entered in any court having jurisdiction." We conclude therefore that the judgment entered pursuant to the complaint to enforce the arbitration award was a judgment rendered on a written instrument. See *Jones v Jackson National Life Ins Co*, 819 F Supp 1382, 1384 (WD Mich, 1993) (judgment "rendered on a written instrument" is one that enforces a written instrument).

Accordingly, Young is entitled to interest calculated under §6013(5).

Affirmed in part, reversed in part, and remanded for modification of the judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ William C. Whitbeck

APPENDIX C

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

C/A NO: 98-003943-CZ

[Filed August 12, 1998]

ERNEST I. YOUNG and SPP, INC., Plaintiffs,	)
v.	)
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS d/b/a SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION, SPECIAL PLASTIC PRODUCTS, L.L.C., SPECIAL PRODUCTS ENGINEERING, L.L.C. and NAB GROUP, L.L.C., Defendants.	)

Randall J. Gillary (P29905)
RANDALL J. GILLARY, P.C.
Attorney for Plaintiffs/Counter-Defendants
201 W. Big Beaver Road, Ste. 1020
Troy, MI 48084
(248) 528-0440

Kevin J. Moody (P34900)
Louis B. Reinwasser (P37757)
MILLER, CANFIELD, PADDOCK
AND STONE, P.L.C.
Attorneys for Defendants/Counter-Plaintiffs
Suite 900, One Michigan Avenue
Lansing, MI 48933 (517) 487-2070

FINAL JUDGMENT CONFIRMING MODIFIED AWARD OF ARBITRATORS

At a session of the said Court, held in the City of Pontiac, County of Oakland, State of Michigan, on: Aug 12, 1998

PRESENT: THE HONORABLE DENISE LANGFORD MORRIS
CIRCUIT COURT JUDGE

This matter having come before the Court on Plaintiff's Motion for Confirmation of Modified Arbitration Award; oral arguments having been presented in open Court; and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that the Award of Arbitrators dated April 10, 1998, as modified by the Order Modifying Award of Arbitrators dated May 18, 1998, be and the same hereby is confirmed, and Final Judgment is hereby entered as follows:

AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the December 15, 1994

arbitration agreement entered into by the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, AWARD on the first Amended Arbitration Claim as follows:

Count I - Breach of Contract - Joint Venture Master Agreement and SPP LLC Operating Agreement

No cause for action and no damages awarded.

Count II - Dissolution and Winding Up of Special Products Engineering, LLC and NAB Group, LLC

Pending submission of further proofs.

Count III- Breach of Employment Agreement

Award to Ernest I. Young $546,351.33 against Sault Ste. Marie Tribe Economic Development Commission and Special Plastic Products, L.L.C.

No award to Ernest I. Young and SPP, Inc. against Special Products Engineering, L.L.C. and NAB Group, L.L.C.

Counter-Claim of Sault Ste. Marie Tribe of Chippewa Indians, d/b/a The Sault Ste. Marie Tribe Economic Development Commission

No cause for action and no damages awarded.

This Award is in full settlement of all Count I and Count III claims and counter-claims submitted by either party

against the other in this arbitration. This Award is inclusive of all costs, attorney fees, interest, and reduction to present value. Count II claims are still pending.

~~IT IS FURTHER ORDERED that interest shall accrue on the amount of the Judgment from April 10, 1998 through the date of satisfaction of this Judgment at the rate of 12% per year compounded annually, said interest to be paid to Ernest I. Young by the Sault Ste. Marie Tribe Economic Development Commission and Special Plastic Products, L.L.C.~~

/s/_____
JUDGE DENISE LANGFORD MORRIS
CIRCUIT COURT JUDGE

APPROVED AS TO FORM:

_____
RANDALL J. GILLARY (P 29905)
Attorney for Plaintiffs

_____
KEVIN J. MOODY (P 34900)
Attorney for Defendants

APPENDIX D

STATE OF MICHIGAN

THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

No. 98-003943-CZ

[Dated July 22, 1998]

ERNEST I. YOUNG, and SPP, INC., Plaintiffs,	)
v.	)
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, d/b/a SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION, SPECIAL PLASTIC PRODUCTS LLC, SPECIAL PRODUCTS ENGINEERING , LLC and NAB GROUP, LLC, Defendants.	)

MOTIONS & COURT'S RULING

PROCEEDINGS had in the above-entitled matter before the HONORABLE DENISE LANGFORD MORRIS (P34884), Circuit Judge, on WEDNESDAY, JULY 22, 1998.

Circuit Court Motions & Court's Ruling - 7/22/98

APPEARANCES:

RANDALL J. GILLARY, Esq., (P29905) appearing on behalf of the Plaintiffs,

KEVIN J. MOODY, Esq., (P34900) appearing on behalf of the Defendants.

PAMELA L. VOLL
Official Court Reporter
CSR 0195

* * *

THE COURT: This matter is before the Court on multiple motions regarding the arbitration award by both Plaintiff and Defendant. Responses have been filed, and the Court has heard oral arguments here this afternoon.

The facts are briefly as follows.

This action arises from a joint venture between Plaintiff Young and the Sault Ste. Marie Tribe of Chippewa Indians (hereinafter "Tribe") through its Economic Development Commission (hereinafter "EDC") to own and operate a plastic injection manufacturing facility, Special Plastic Products (hereinafter "SPP"). When the joint venture was formed, three agreements were executed: The Master Agreement, the Operating Agreement and the Employment Agreement. SPP failed, and Plaintiff Young requested arbitration on several issues: Count I - Breach of Contract - Joint Venture Master Agreement and SPP Operating

Agreement; Count II - Dissolution and Winding Up of SPP and NAB Group; and Count III - Breach of Employment Agreement. (First Amended Arbitration Claim)

The arbitration was held on January 21 through 23 and February 4, 1998. Closing statements and briefs were filed on or about March 3rd. The arbitrators indicated that the record was closed.

On February 19, 1998, Plaintiff brought the instant lawsuit to enter judgment on the arbitration award.

On April 10, 1998 the Award of Arbitrators was issued. The award provided: as to Count I - No cause of action and no damages awarded; Count II -Pending submission of further proofs; and Count III -Award to Ernest Young five hundred forty-six thousand three hundred fifty-one dollars and thirty-three cents against Tribe EDC and SPC, no award to Ernest Young and SPP against SPE and NAB Group; and as to counter-claim, no cause of action and no damages awarded.

Plaintiff filed a motion on April 22 to confirm the Arbitration Award, which was denied by this Court as premature. Plaintiff has since filed a Motion to Modify Award, a Motion to Confirm Modified Award and a Counter-Motion for Summary Disposition.

Defendants have filed a Motion for Summary Disposition and Sanctions, a Motion to vacate or Modify Award, and a Motion for Summary Disposition on Counter-Claim to vacate or modify award.

Circuit Court Motions & Court's Ruling - 7/22/98

This Court notes that this case is a procedural nightmare which arose because Plaintiff filed the initial action to enforce the award before the Arbitration Award had ever been issued. However, in the interest of judicial economy, this Court chooses not to dismiss the complaint without prejudice, as requested by, Defendants, even though it was premature, since the Award has been issued and the parties have filed numerous pleadings in the matter, and the Court did have subject matter jurisdiction at the time the Complaint was filed.

The standard of review is as follows:

MCR 3.602(I) provides that an arbitration award...may be confirmed by the court unless it is vacated, corrected, or modified or a decision is postponed...

MCR 3.602(J) provides in relevant part that: 1) on application of a party, the Court shall vacate an award if: c) the arbitrator exceeded his or her powers. The fact that the relief could or would not be granted by a court of law or equity, is not grounds for vacating or refusing to confirm the award. 3) In vacating the award, the Court may order a rehearing before a new arbitrator as provided in the agreement... If the award is vacated on grounds stated in, subrule (J)(1)(c), the Court may order a rehearing before the arbitrator who made the award.

MCR 3.602(K) provides in relevant part: The Court shall modify or correct the award if: a) there is an evident miscalculation on figures or an evident mistake in the description of a person, a thing or property referred to in the

award; b) the arbitrator has awarded on a matter not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the issue submitted; or c) the award is imperfect in a matter of form, not affecting the merits of the controversy.

MCL 600.5001: (1) permits parties to submit disputes to arbitration, but requires that the submission be by an instrument in writing: (2) provides that an arbitration provision in a written contract shall stand as a submission to arbitration of any controversies between the parties to the contract.

MCR 2.116(C)(10) provides for summary disposition if there is no genuine issue of material fact. Affidavits, depositions, admissions or other documentary evidence must be submitted to support or oppose a (C) (10) motion. MCR 2.116(G) (3) and (4). A (C) (10) motion tests whether a genuine issue of material fact remains upon which reasonable minds could differ, Michaels versus Amway Corporation, 206 Mich App 644, 649, 1994. In making this determination, the Court considers the evidence in favor of the nonmoving party. Id.

MCR 2.116(C)(8) provides for summary disposition for failure to state a claim on which relief can be granted. The Court determines whether Plaintiff has a prima facie case based solely on Plaintiff's pleadings. Garvelink versus Detroit News, 206 Mich App 604, 607, 1994; MCR 2.116(G)(5). All factual allegations supporting the claim are accepted as trues, as well as any reasonable inferences which can be drawn from the facts. ETT Ambulance versus

Rockford Ambulance, 204 Mich App 393, 395, 1994. Mere statements of conclusions unsupported by allegations of fact will not suffice to state a cause of action. Id. Summary disposition is proper if the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. Id. at 396.

The analysis is as follows.

Suits against Indian tribes are barred by sovereign immunity absent a clear and unequivocal waiver by the Tribe or a congressional abrogation. The filing of a suit by a tribe does not waive the tribe's immunity with respect to counter-claims. Huron Potawatomi versus Stinger, 227 Mich App 121, 1997. A tribe's sovereign immunity extends to agencies and subordinate economic enterprises of the tribe. Altheimer & Gray versus Sioux Manufacturing, 983 F2d 803 (CA 7 1993).

The Tribe EDC is a tribal entity chartered by the Tribe pursuant to Tribal Code section 44.102(5). As such, it is entitled to sovereign immunity unless it clearly and unequivocally waived that immunity. The Master Agreement entered into between SPP, Plaintiff Young and the Tribe EDC provides that the parties shall form and operate at least three separate Limited Liability Companies with EDC and Young, each owning fifty percent. These three entities are collectively referred to as the "Company." The Master Agreement contains Arbitration and Waiver of Sovereign immunity and Consent to Suit clauses. The Arbitration provision provides:

Any controversy or claim arising out of or relating to this Agreement or the breach of this Agreement shall be resolved by arbitration administered by the office of the American Arbitration Association located in Oakland County, Michigan in accordance with its then current commercial arbitration rules. Except as provided in subsection (b), arbitration shall be the exclusive remedy of the parties. Judgment upon the award rendered by the arbitration may be entered in any court having jurisdiction.

The waiver provision provides:

The EDC hereby waives its immunity from suit to enforce the provisions of this Agreement, and all agreements executed and delivered at the Closing and/or pursuant to this Agreement, and consents to the exercise of jurisdiction over such suit by any court which may have jurisdiction over the subject matter, subject to the following conditions and limitations:

> (a) the waiver is granted solely to the parties and the Companies, their representatives, agents, trustees, successors, and assigns, and does not extend to third parties;

(b) the governing law shall be the law of the State of Michigan;

(c) the waiver shall extend only to the enforcement of the obligations of the EDC under this Agreement (including the agreement to arbitration) or to damages for breach of this Agreement by the EDC;

(d) this waiver shall expire six years after the termination of the companies or successor entities; and

(e) the waiver shall be enforceable solely against the assets of the EDC, as provided in Sault Ste. Marie Tribe Tribal Code section 40.108(1).

The Employment Agreement is one of the listed documents in the Master Agreement to be executed and delivered at Closing. The Employment Agreement was entered into between SPP, SPE, the NAB Group and Plaintiff Young. The Tribe EDC was not a party to the Employment Agreement. The Employment Agreement provides that "This Agreement is one of the documents executed at the Closing as part of the transaction governed by the Joint Venture Master Agreement."

Defendants argue that the employment claim against the Tribe EDC is barred by tribal sovereign immunity which was not waived. Defendants also argue that the award based

on the Employment Agreement is beyond the scope of the arbitrators' authority because the Tribe was never a party to the Employment Agreement and never agreed to arbitrate employment claims.

The appropriate standard of review for determining whether arbitrators have exceeded the scope of their authority was set forth in Daiie versus Gavin, 416 Mich 407, 1982, and more recently in Gordon Sel-way versus Spence Brothers, 438 Mich 488, 1991. In Gavin, the Supreme Court stated that a reviewing Court's ability to review an award is restricted to cases in which an error or law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agree will constitute the record. Therefore, arbitrators have exceeded their powers whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law. Where it clearly appears on the face of the award or in the reasons for the decision, being substantially a part of the award, that the arbitrators through an error of law have been led to a wrong conclusion and that, but for such an error of law that will require a court of law to vacate an arbitration award must be so substantial as to have governed the award, and the error must be one but for which the award would have been substantially otherwise. Dohanyos v. Detres Corporation, 217 Mich App 171, 175-176, 1996.

This Court, after a careful review of the briefs, exhibits and relevant case law, finds that the Tribe EDC clearly and unequivocally waived its sovereign immunity in the provisions of the Master Agreement. Pursuant to its

terms, this waiver encompassed all of the Agreements executed and delivered at closing, including the Employment Agreement.

Therefore, Defendants' argument based on sovereign immunity fails. Likewise, Defendants' argument concerning the agreement to arbitrate must fail. The Arbitration provision of the Master Agreement clearly provides that any controversy or claim arising out of or relating to this Agreement, or the breach of this Agreement, shall be resolved by arbitration. The Employment Agreement not only arises out of the Master Agreement, but is included as paragraph 9B of the Master Agreement.

Therefore, pursuant to the terms of the Master Agreement, the Defendants agreed to arbitrate the Employment Agreement.

Finally, this Court finds that there was substantial authority to support the finding of the arbitrators that Defendants breached the Employment Agreement and there is no basis for this Court to conclude that the arbitrators exceeded their powers in issuing the Award against the Tribe.

Therefore, Defendants' Motion to Vacate or Modify the Arbitration Award Motion for Summary Disposition on Counter-Claim to Vacate or Modify Award and Motion for Summary Disposition and Sanctions are denied pursuant to MCR 3.602(J) (1) and MCR 2.116(C) (8).

Plaintiff's Motion for Modification/Correction of Arbitration Award is granted pursuant to MCR 3.602 (K) (1)

(c). The second page of the Award of Arbitrators contains an error in its summary paragraph. In order to correctly summarize the findings, it should read that: "This award is in full settlement of all Count I and Count III claims and counter-claims submitted by either party against the other in this arbitration. This award is inclusive of all costs, attorney fees, interest and reduction to present value. Count II claims are still pending."

Plaintiff's Counter-Motion for Summary Disposition and Motion for Confirmation of the Modified Arbitration Award are granted pursuant to MCR 3.602(I) and MCR 2.116(C) (10).

In conclusion, it is hereby ordered that Defendants' Motion to Vacate or Modify the Arbitration Award Motion for Summary Disposition on Counter-Claim to Vacate or Modify Award and Motion for Summary Disposition and Sanctions pursuant to MCR 3.602(J) (1) and MCR 2.116(C) (8) are denied.

It is hereby ordered that Plaintiff's Motion for Modification/Correction of Arbitration Award pursuant to MCR 3.602(K) (1) (c) is granted.

It is hereby ordered that Plaintiff's Counter-Motion for Summary Disposition and Motion for Confirmation of the Modified Arbitration Award pursuant to MCR 3.602(K) and MCR 2.116(C) (10) are granted.

I'll sign the appropriate order.

MR. GILLARY: Thank You, Your Honor. I've prepared a judgment on the modified arbitration award, if I can review it with counsel.

THE COURT: Show it to opposing counsel and present it to the Clerk.

MR. GILLARY: Thank you, Your Honor

MR. MOODY: Thank you.

* * *

CERTIFICATE OF COURT REPORTER

I, PAMELA L. VOLL, an Official Court Reporter, do hereby certify that I reported stenographically the foregoing proceedings at the time and place hereinbefore set forth; that the same was later reduced to typewritten form by me, and that the foregoing transcript constitutes a true and correct transcription of my stenographic notes so taken.

/s/_____
PAMELA L. VOLL
OFFICIAL COURT REPORTER
CSR 0195

APPENDIX E

AMERICAN ARBITRATION ASSOCIATION

Case No. 54-1450043796

[Dated April 10, 1998]

Ernest I. Young and SPP, Inc.,	)
	)
Claimants,	)
	)
v.	)
	)
Special Plastic Products, L.L.C.;	)
Special Products Engineering, L.L.C.;	)
NAB Group, L.L.C.; and	)
Sault Ste. Marie Tribe of Chippewa	)
Indians, d/b/a The Sault Ste. Marie Tribe	)
Economic Development Commission,	)
	)
Respondents.	)
	)

AWARD OF ARBITRATORS

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the December 15, 1994 arbitration agreement entered into by the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, AWARD on the first Amended Arbitration Claim as follows:

American Arbitration Association
Award of Arbitrators - 4/10/98

Count I - Breach of Contract - Joint Venture Master Agreement and SPP LLC Operating Agreement

No cause for action and no damages awarded.

Count II - Dissolution and Winding Up of Special Products Engineering, LLC and NAB Group, LLC

Pending submission of further proofs.

Count III - Breach of Employment Agreement

Award to Ernest I. Young $546,351.33 against Sault Ste. Marie Tribe Economic Development Commission and Special Plastic Products, L.L.C.

No award to Ernest I. Young and SPP, Inc. against Special Products Engineering, L.L.C. and NAB Group, L.L.C.

Counter-Claim of Sault Ste. Marie Tribe of Chippewa Indians. d/b/a The Sault Ste. Marie Tribe Economic Development Commission

No cause for action and no damages awarded.

This Award is in full settlement of all Count I and Count II claims and counterclaims submitted by either party against the other in this arbitration. This Award is inclusive of all costs, attorney fees, interest, and reduction to present value. Count II claims are still pending.

Dated: 4-10-98 /s/_____
Dated: 4-10-98 /s/_____
Dated: 4-10-98 /s/_____

APPENDIX F

REVISED JUDICATURE ACT OF 1961 (EXCERPT)
Act 236 of 1961

600.6013 Interest on money judgment.

Sec. 6013. (1) Interest is allowed on a money judgment recovered in a civil action, as provided in this section. However, for complaints filed on or after October 1, 1986, interest is not allowed on future damages from the date of filing the complaint to the date of entry of the judgment, As used in this subsection, "future damages" means that term as defined in section 6301.

***

(5) Except as provided in subsection (6), for a complaint filed on or after January 1, 1987, but before July 1, 2002, if a judgment is rendered on a written instrument, interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case, interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.

APPENDIX G

BEFORE THE AMERICAN ARBITRATION ASSOCIATION

Case No. 54 1450043796

ERNEST I. YOUNG and SPP, INC.,	)
	)
Claimants,	)
	)
v.	)
	)
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, d/b/a SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION, SPECIAL PLASTIC PRODUCTS LLC, SPECIAL PRODUCTS ENGINEERING, LLC and NAB GROUP, LLC,	)
	)
Respondents.	)
	)
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, d/b/a SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION, SPECIAL PLASTIC PRODUCTS LLC, SPECIAL PRODUCTS ENGINEERING, LLC and NAB GROUP, LLC,	)
	)
Counter-Claimants,	)
	)

v.)
)
ERNEST I. YOUNG and SPP, INC.,)
)
Counter-Respondents.)
)

RESPONDENTS' ARBITRATION BRIEF

* * *

B. Because the Tribe EDC waived sovereign immunity solely for the purpose of enforcing the express agreements, or for suit seeking damages for breach of those agreements, there can be no liability for an alleged breach of any duty imposed by law as this Panel has already noted.

In their Brief in Opposition to Motion to Amend and Addressing Scope of Arbitration, filed earlier with this Arbitration Panel (excerpts attached as Exhibit A), Respondents set forth a thorough discussion of the doctrine of sovereign immunity.[5] The arbitrators have already determined that such sovereign immunity pertains to the Tribe and the Tribe EDC and even Claimants do not seriously dispute this at this time.

---

[5] In a nutshell, the law is "'settled that wavier of [an Indian Tribe's] sovereign immunity cannot be implied but must be unequivocally expressed.'" Santa Clara Pueblo v. Martinez, 436 US 49, 58 (1978).

* * *

D. There Is No Basis For Piercing The Corporate Veil.

Young's Employment Agreement was with the LLC, and not with the Tribe. Young now seeks to pierce the corporate veil of the LLC to impose liability on the Tribe EDC.

Piercing the corporate veil is an equitable remedy employed sparingly by courts to avoid injustice. It is a judge-imposed, common-law remedy. It is not a contractual right or remedy nor is it a claim for which the Tribe or the Tribe EDC waived sovereign immunity.

* * *

APPENDIX H

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

No. 98-003943-CZ

[Dated May 7,1998]

ERNEST I. YOUNG and SPP, INC., Plaintiffs,	)
v.	)
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, d/b/a SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION, SPECIAL PLASTIC PRODUCTS LLC, SPECIAL PRODUCTS ENGINEERING, LLC and NAB GROUP, LLC, Defendants	)

Randall J. Gillary (P29905)
RANDALL J. GILLARY, P.C.
Attorney for Plaintiffs/Counter-Defendants
201 W. Big Beaver Road, Ste. 1020
Troy, MI 48084
(248) 528-0440

Kevin J. Moody (P34900)
Louis B. Reinwasser (P37757)
MILLER, CANFIELD, PADDOCK
AND STONE, P.L.C.
Attorneys for Defendants/Counter-Plaintiffs
Suite 900, One Michigan Avenue
Lansing, MI 48933 (517) 487-2070

BRIEF IN SUPPORT OF MOTION TO VACATE OR MODIFY ARBITRATION AWARD

INTRODUCTION

Plaintiffs, Ernest I. Young and SPP, Inc. filed this action seeking to confirm an arbitration award several weeks before the award was even issued.

* * *

THE AWARD SHOULD BE VACATED OR MODIFIED

In late 1994, the Sault Ste. Marie Tribe of Chippewa Indians (the "Tribe"), through its Economic Development Commission (the "Tribe EDC"), entered into a joint venture with Plaintiff Ernest Young to own and operate a plastic injection manufacturing facility. The business met with hard times and the Tribe EDC lost millions of dollars, primarily due to the failure of Plaintiff Young's management. The Plaintiffs, however, blamed the Tribe EDC for the demise of the business. They requested arbitration on a number of issues, but were successful only on Plaintiff Young's claim for breach of an *employment* agreement. See, Arbitration Award, attached as Exhibit E to Defendants' Counterclaim.

This arbitration award should be vacated or modified for the following reasons:

a. The Tribe EDC was not the employer of Young, was never a party to Young's Employment Agreement (copy attached to Defendants' Counterclaim as Exhibit C) and therefore could not have breached that Employment Agreement;

b. The Tribe EDC never agreed to submit to the jurisdiction of the arbitrators for the purpose of determining its liability under the Employment Agreement, as the Tribe EDC was not a party to the Employment Agreement and did not otherwise agree to arbitrate any issues concerning the Employment Agreement;

c. In particular, The Tribe EDC is immune from suit unless it unequivocally waives such immunity; there was no waiver of immunity for any claims brought pursuant to the Employment Agreement, especially some undefined, vague claim based on the notion of piercing the corporate veil which was never pled in any of the multiple arbitration claims filed by Young and SPP, Inc.;

d. Young waived any claim for breach of the Employment Agreement against the Tribe EDC by failing to plead in his arbitration claim that the Tribe EDC was a party to the Employment Agreement, that the Tribe EDC somehow breached the Employment Agreement or some other basis for finding the Tribe EDC liable for a breach of the Employment Agreement;

e. Young waived any claim against the Tribe EDC for breach of the Employment Agreement by failing to plead in his arbitration claim that the Tribe EDC somehow waived sovereign immunity;

f. The Arbitrators did not have jurisdiction to decide the issue of whether the Employment Agreement was enforceable against the Tribe EDC which was never a party to that agreement;

g. The Arbitrators did not have jurisdiction to determine whether the limited liability of members of SPPLLC should be ignored;

h. There was no factual or legal support for the Arbitrators' actions in ignoring the limited liability enjoyed by members of SPPLLC;

***

APPENDIX I

STATE OF MICHIGAN
IN THE COURT APPEALS

No. 214136
Oakland County Circuit Court No. 98-003943-CZ

[Dated March 9, 1999]

ERNEST I. YOUNG and SPP, INC.,
Plaintiffs/Appellees,
v.
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, d/b/a SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION, SPECIAL PLASTIC PRODUCTS LLC, SPECIAL PRODUCTS ENGINEERING, LLC and NAB GROUP, LLC,
Defendants/Appellants.

Randall J. Gillary (P29905)
RANDALL J. GILLARY, P.C.
Attorney for Plaintiffs/Counter-Defendants
201 W. Big Beaver Road, Ste. 1020
Troy, MI 48084
(248) 528-0440

Kevin J. Moody (P34900)
Louis B. Reinwasser (P37757)
MILLER, CANFIELD, PADDOCK
AND STONE, P.L.C.
Attorneys for Defendants/Counter-Plaintiffs
Suite 900, One Michigan Avenue
Lansing, MI 48933 (517) 487-2070

APPELLANTS' BRIEF ON APPEAL

STATEMENT OF QUESTIONS INVOLVED

Did the trial court err when it refused to vacate, and in fact confirmed, an arbitration award entered on a claim for breach of an employment contract against a sovereign Indian Tribe when:

1. The Tribe was never a party to the contract, never agreed to arbitrate any claims arising from the contract and never submitted to the jurisdiction of the arbitrators on the breach of contract claim?

The trial court said "No."
Plaintiff/Appellee says "No."
Defendant/Appellant says "Yes."

2. The law requires that any waiver of sovereign immunity be express and unequivocal and no such waiver was ever obtained in this case and was never even pled in the arbitration claim?

The trial court said "No."
Plaintiff/Appellee says "No."
Defendant/Appellant says "Yes."

3. Plaintiff failed to plead in his arbitration claim or otherwise provide notice prior to arbitration that he intended to allege that the Tribe was a party to and had breached the contract?

The trial court said "No"
Plaintiff/Appellee says "No."
Defendant/Appellant says "Yes."

4. The arbitration record composed of a certified transcript and exhibits, establishes that the arbitrators acted in contravention of controlling principles of law and ignored the express terms of the employment contract which provided that the contract would automatically terminate upon the disability of Plaintiff; disability is defined in the employment contract as any physical or mental incapacity which rendered Plaintiff unable to continually and consistently conduct the business of his employer for any consecutive six-month period; Plaintiff unequivocally admitted at the arbitration that he was disabled for more than six consecutive months and that he had filed a claim for workers' compensation in which he specifically alleged that he was so disabled?

The trial court said "No."
Plaintiff/Appellee says "No."
Defendant/Appellant says "Yes."

5. The arbitration record composed of a certified transcript and exhibits, establishes that the arbitrators acted in contravention of controlling principles of law and ignored the express terms of the employment contract which permitted Plaintiff's employer to terminate him for cause, where the evidence at the arbitration was uncontroverted that Plaintiff had twice assaulted another employee, had pled no contest to a charge of disorderly conduct brought as a result of the assault, and had been fined and sentenced to jail time, also as a result of the assault?

The trial court said "No."
Plaintiff/Appellee says "No."
Defendant/Appellant says "Yes."

6. The arbitration record composed of a certified transcript and exhibits, establishes that the arbitrators did not have jurisdiction to determine whether the limited liability of the Tribe, as a member of a limited liability company which employed Plaintiff, should be ignored; nor was there any factual or legal support for the arbitrators' actions in ignoring the limited liability enjoyed by the Tribe as a member of the limited liability company?

The trial court said "No."
Plaintiff/Appellee says "No."
Defendant/Appellant says "Yes."

APPENDIX J

STATE OF MICHIGAN
IN THE SUPREME COURT

COA No. 214136

Oakland County Circuit Court
Case No. 98-003943-CZ

[Dated June 1, 2001]

ERNEST I. YOUNG and SPP, INC.,
Plaintiffs/Appellees,
v.
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS, d/b/a SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION, SPECIAL PLASTIC PRODUCTS LLC, SPECIAL PRODUCTS ENGINEERING, LLC and NAB GROUP, LLC,
Defendants/Appellants.

Randall J. Gillary (P29905)
RANDALL J. GILLARY, P.C.
Attorney for Plaintiffs/Counter-Defendants
201 W. Big Beaver Road, Ste. 1020
Troy, MI 48084
(248) 528-0440

Kevin J. Moody (P34900)
Louis B. Reinwasser (P37757)
MILLER, CANFIELD, PADDOCK
AND STONE, P.L.C.
Attorneys for Defendants/Counter-Plaintiffs
Suite 900, One Michigan Avenue
Lansing, MI 48933 (517) 487-2070

APPLICATION FOR LEAVE TO APPEAL

STATEMENT OF QUESTIONS PRESENTED

Did the trial court and Court of Appeals err when they refused to vacate, and in fact confirmed, an arbitration award entered on a claim for breach of an employment contract against a sovereign Indian Tribe when:

1. The Tribe was never a party to the employment contract, never agreed to arbitrate any claims arising from the contract and never submitted to the jurisdiction of the arbitrators on the breach of contract claim?

The lower courts said "No."
Plaintiff/Appellee says "No."
Defendant/Appellant says "Yes."

2. The law requires that any waiver of sovereign immunity be express and unequivocal and no such waiver was ever obtained in this case and was never even pled in the arbitration claim?

The lower courts said "No."
Plaintiff/Appellee says "No."
Defendant/Appellant says "Yes."

3. Plaintiff failed to plead in his arbitration claim or otherwise provide notice prior to arbitration that he intended to allege that the Tribe was a party to and had breached the employment contract?

The lower courts said "No."
Plaintiff/Appellee says "No."
Defendant/Appellant says "Yes."

4. The arbitration record composed of a certified transcript and exhibits, establishes that the arbitrators acted in contravention of controlling principles of law and ignored the express terms of the employment contract which provided that the contract would automatically terminate upon the disability of Plaintiff; disability is defined in the employment contract as any physical or mental incapacity which rendered Plaintiff unable to continually and consistently conduct the business of his employer for any consecutive six-month period; Plaintiff unequivocally admitted at the arbitration that he was disabled for more than six consecutive months and that he had filed a claim for workers' compensation in which he specifically alleged that he was so disabled?

The lower courts said "No."
Plaintiff/Appellee says "No."
Defendant/Appellant-says "Yes."

5. The arbitration record composed of a certified transcript and exhibits, establishes that the arbitrators acted in contravention of controlling principles of law and ignored the express terms of the employment contract which permitted Plaintiff's employer to terminate him for cause, where the evidence at the arbitration was uncontroverted that Plaintiff had twice assaulted another employee, resulting in a conviction of disorderly conduct brought as a result of the assault, and had been fined and sentenced to jail time, also as a result of the assault?

The lower courts said "No."
Plaintiff/Appellee says "No."
Defendant/Appellant says "Yes."

6. The arbitration record composed of a certified transcript and exhibits, establishes that the arbitrators did not have jurisdiction to determine whether the limited liability of the Tribe, as a member of a limited liability company which employed Plaintiff, should be ignored; nor was there any factual or legal support for the arbitrators' actions in ignoring the limited liability enjoyed by the Tribe as a member of the limited liability company?

The lower courts said "No."
Plaintiff/Appellee says "No."
Defendant/Appellant says "Yes."

7. There was no waiver of sovereign immunity, or anything close, to allow imposition of Michigan's interest statute upon any award entered in this matter.

The lower courts said "No."
Plaintiff/Appellee says "No."
Defendant/Appellant says "Yes."

APPENDIX K

SPECIAL PLASTIC PRODUCTS L.L.C.

[Dated January 1, 1995]

EMPLOYMENT AGREEMENT

THIS EMPLOYMENT AGREEMENT, made and entered into effective the 1st day of January, 1995, by and between **SPECIAL PLASTIC PRODUCTS L.L.C.**, a Michigan limited liability company, (the "Company"), **SPECIAL PRODUCTS ENGINEERING L.L.C.**, a Michigan limited liability company ("SPELLC"), **NAB GROUP L.L.C.**, a Michigan limited liability company ("NABGLLC"), and **ERNEST I. YOUNG**, ("Employee").

RECITALS:

Young has been President and sole owner of the predecessor to the Company for more than 15 years. Young has recently entered into a joint venture with The Sault Ste. Marie Tribe of Chippewa Indians (the "Tribe"), which includes Young's operation of the Company. The Company thus desires to employ Young as Manager and Chief Executive Officer of the Company under the terms of this Agreement.

The owners of the Company also have related enterprises known as NABGLLC, which owns the real estate the Company operates from, and SPELLC, which conducts related engineering operations. Young is also by this

agreement retained as Chief Executive Officer of those entities under this Agreement.

NOW, THEREFORE, in consideration of the foregoing and the promises and agreements stated herein, the receipt and adequacy of consideration being hereby acknowledged, Company and Young agree, promise and covenant as follows:

1. **SERVICES.**

1.1 **Company.** The Company engages the services of Young as Chief Executive Officer of the Company. Young shall retain sole responsibility for maintaining and controlling the day-to-day operations of the Company, including the authority to do all acts permitted of the CEO under the Company's Operating Agreement, subject only to those limitations stated in the Operating Agreement. Young shall direct and control all employees of the Company, and has the exclusive discretion to delegate portions of his responsibilities and powers to officers and employees of the Company.

1.2 **Related Enterprises.** Young is also hereby retained as Chief Executive Officer of SPELLC and NABGLLC. He shall carry on those duties and tasks specified in the Operating Agreement for each of those enterprises. He shall receive no additional compensation by reason of those duties. The Company's accountants may, however, allocate a ratable portion of Young's compensation and benefits to those enterprises as is appropriate.

2. **YOUNG'S EFFORT.** Young will undertake his duties in good faith, with the care of an ordinary prudent person in like circumstances, consistent with the best interests of the Company.

3. **INCOME.**

3.1 **Salary.** Young shall be paid an annual salary of $145,000 per year, payable at least twice monthly, or by such other frequency as is elected by the Company. The Company shall review the salary of Young during the first quarter of each calendar year, and if Gross Sales (as defined below) have increased over the level of Gross Sales for the previous year (regardless of whether Net Cash Flow has been generated), then Young's salary shall be increased by an amount to be set by the Company of not less than three (3%) or more than six (6%) percent of the previous year's salary for that calendar year. Salary payments for the year shall be adjusted to reflect the increase on an annualized basis.

3.2 **Bonus.** In addition to all other payments made to Young hereunder, Young shall be paid a bonus each year the Company generates Net Cash Flow (as that term is defined in the Company's Operating Agreement), in the following amounts:

A. For calendar year 1995, 2% of the amount of Gross Sales in excess of $12,500,000;

B. For each calendar year thereafter, 2% of the increase in Gross Sales above the greater of (i)

Gross Sales in the last calendar year for which a bonus was paid, or (ii) $12,500,000.

The bonus shall be paid to Young within 30 days after Gross Sales for the previous year are ascertained by the firm's accountants, and shall be subject to adjustment if an audit is performed or the statements are corrected within one year after the bonus is paid. The obligation to pay a bonus for service during the term hereof shall survive the expiration or termination of this Agreement.

3.3 **Benefits.** Young shall be paid the following benefits by the Company: health insurance for his family; the premium for his present $1,000,000 life insurance policy, for the benefit of his family; disability insurance; and membership dues and fees at Indianwood Country Club. The Company shall pay the comparable cost of any replacement of the foregoing items. The Company shall assume the existing vehicle lease on the Cadillac Seville currently used by Young, and provide that vehicle for Young's use, and upon expiration of the lease shall thereafter provide Young with a vehicle allowance (or payment) equivalent to the cost of a three year lease of a vehicle equivalent to a Cadillac Seville. In addition to the foregoing, Young shall be entitled to, Pension, Keogh Plan or equivalent benefits equal to five (5%) percent of his salary. Young shall also receive reimbursement of any taxes he incurs in liquidating the predecessor to the Company, to be advanced to Young concurrent with the returns or dates and such payments are owed, up to a total of $230,000.

3.4 **Loans.** Young shall be entitled to borrow up to Fifty Thousand and 00/100 ($50,000) Dollars from the

Company, provided the Company generates a Net Cash Flow in any year a loan is extended, after paying its minimum commitment to the Tribe under the Expansion Loan. Young must repay such loans within one year, or immediately if the conditions in the previous sentence are not met. All loans shall accrue interest at the imputed interest rate of the Internal Revenue Service.

3.5 **Gross Sales.** As used herein, "Gross Sales" means the proceeds received by SPPLLC and SPELLC from all business operations of whatever nature in the applicable period, calculated in accordance with generally accepted accounting principles, consistently applied, less returns and allowances, and excluding any sales or other business conducted by SPELLC which is obtained from, or paid by, SPPLLC.

4. **EXPENSES.** Young shall receive reimbursement for all travel, business and entertainment expenses reasonably incurred by him in connection with the Company's business. Such expenses shall be reported contemporaneously, and paid promptly upon presentation of appropriate vouchers and receipts, in accordance with policies adopted by the Management Board.

5. **VACATION.** Young shall be entitled to five weeks' vacation annually during the term of this Agreement, to be taken at such times as shall be reasonably determined by Young.

6. **TERM OF AGREEMENT.** This Agreement commences as of the date hereof and has a minimum term of

five years and four months, through December 31, 1999. This Agreement shall be automatically renewed each year thereafter for up to seven additional consecutive years, unless sooner terminated as provided herein. Following the initial twelve year period, this Agreement shall be automatically extended for one additional year unless on or before September 30 of each year, either Young or the Company notify the other in writing that the term shall not be extended for an additional year.

7. TERMINATION.

7.1 Without Cause. This Agreement shall terminate upon the death or disability of Young, or sale or transfer by SPP of its entire interest in the Company, or by Young of his entire interest in SPP, excepting in each case any permitted assignment under the Company's Operating Agreement. Young may terminate this Agreement upon 60 days' written notice, with or without cause. If Young terminates his employment without the written consent of the Management Board, the Company has no further obligation to Young.

7.2 For Cause. The Company may terminate this Agreement for cause by giving Young written notice of termination specifying with particularity the basis for termination. Termination for cause is strictly limited herein to (a) conviction for committing a felony, (b) fraud or theft of Company property, and (c) gross negligence or recklessness in Young's performance of his duties hereunder, which causes material harm to the Company. No advance notice is required for violations of (a) or (b). If any violation under (c) generates

circumstances which are continuing or can be cured, then Young shall be given 20 days after written notice to cure the situation.

7.3 **Liquidated Damages.** If this Agreement is terminated by the Company without cause, except as provided in ¶ 6, then Young shall be paid the following by the Company:

A. For terminations during the initial five year term of this Agreement, the amount equal to all salary, bonus and benefits payable from the date of termination through the end of the initial term; or

B. For all terminations thereafter, the amount equal to all salary, bonus and benefits for one year.

In calculating the amount payable, the rate of salary and benefits payable to Young at the time of termination shall be used, adjusted as provided in this Agreement. The highest bonus payable to Young in the year of termination or the previous three years shall be used. There shall be no reduction to present value, or offset for mitigation from other income of Young against the amount paid as to the first year; all sums thereafter shall be subject to such offset or mitigation. Such payment shall not excuse a termination in violation of this Agreement, but shall be liquidated damages for all claims of compensation of Young after the date of termination against the Company, its Members and Managers.

7.4 Prorations. If Young's employment is terminated or expires in a manner which requires calculation of any item of compensation for a partial year, all items payable for that year shall be prorated by comparing the number of days in that year through the date of termination or expiration to the number of days in that year (365/6).

8. DISABILITY. Young shall be deemed disabled upon the occurrence of any of the following:

a. His death;

b. The occurrence of any physical or mental incapacity which renders him unable to continually and consistently conduct the business of the Company for any consecutive six month period; or

c. The written determination by two physicians independent of one another that Young is at that time suffering a mental or physical condition that renders him unable to continually and consistently conduct the business of the Company for any consecutive six month period.

Young shall reasonably cooperate with any request of the Company to conduct examinations necessary to make the foregoing determination, if there is reasonable cause for such examinations.

9. INDEMNITY. The Company, SPELLC and NABGLLC shall indemnify, defend and hold harmless Young to the extent provided for by applicable law and in the Operating Agreement, including paragraph 6.2 of that Agreement.

10. NON-COMPETITION/ CONFIDENTIALITY.

10.1 Covenant. Young shall not, during the term of his employment with the Company, directly or indirectly, for himself or as agent of or on behalf of or in conjunction with any other person, firm, association, or corporation, or as an employer, employee, partner or other associate, enter into competition with the Company within North America. For the purpose of this covenant, competition shall mean the manufacture and production of products and services of the type then produced by the Company, or substantially similar thereto, to customers of the Company. The protection of this covenant is intended for the benefit of the Company, its subsidiaries, and successors.

10.2 Confidentiality. Young acknowledges that Company's documents, cost analyses, customer lists, names of persons having, dealt with the Company, which Young shall have access to in connection with his duties hereunder, whether designated by the Company as such or not, are confidential and proprietary data which disclosure to, or use by, a third party will be damaging to the Company. Young shall hold such material and information in strict confidence, not make use thereof other than to perform this contract, release the information only to employees requiring such

information in connection with their employment, and not release or disclose the information and materials to any unauthorized persons.

10.3 Inventions. Any inventions or discoveries, whether or not they can be registered under a patent or copyright, resulting from any work performed by Young for the Company, NABGLLC or SPELLC under this Agreement (alone or with others) shall be promptly disclosed to the Company and shall be its exclusive property. All inventions or discoveries belonging to Young prior to his employment by the Company and which relates to the business of the Company are hereby assigned to the Company and shall be its exclusive property. Young agrees to sign and deliver at any time any instruments confirming such rights of the Company.

10.4 Enforcement. In the event of the violation or attempted violation of this provision, and in addition to any legal or equitable remedy which may be available to the Company, this provision may be enforced by an injunction or action for specific performance, without necessity for proving damages.

10.5 Continuation. This covenant not to compete shall continue for a period of 18 months following termination of Young's employment with the Company, except when the Company terminates his employment without cause.

11. OUTSIDE INTERESTS. Young shall not, during the term of his employment with the Company, directly or indirectly, for himself or as agent of or on behalf of or in conjunction with any other person, firm, association,

or corporation, or as an employer, employee, partner or other associate, enter into, participate in or conduct any business venture, company, or enterprise, without the prior written approval of the Company Managers appointed by the Economic Development Commission of The Sault Ste. Marie Tribe of Chippewa Indians. The following are not subject to the prohibition state in this paragraph:

(a) Normal business activities undertaken with respect to those enterprises listed in Exhibit "U" to the Joint Venture Master Agreement, provided such activities are not changed to compete with the Company;

(b) Investments on any recognized stock exchange or other market;

(c) Investments in any form of business entity which does not compete with the Company, NABGLLC or SPELLC, and in which Young's actual role is limited to the functional equivalent of a "passive investor" (as that term is defined in the Code) or a limited partners; and

(d) Participation by Young as a director, board member, officer, or other like position with a charitable, for-profit or non-profit institution, including but not limited to the Michigan Minority Business Development Council, financial institutions, and community-based organizations.

12. SUPPORT. The Company shall provide Young with secretarial support, office space, office equipment, furnishings, supplies and other support suitable for his position as Chief Executive Officer of the Company.

13. GENERAL TERMS.

13.1 Waiver. One or more waivers of any covenant or condition of this Agreement shall not be construed as a waiver of a subsequent breach of the same covenant or condition.

13.2 Notices. Whenever under this Agreement a provision is made for notice of any kind, it shall be deemed sufficient notice and service thereof if such notice is in writing and mailed with first class postage prepaid, by certified or registered mail, by personal delivery, or by express overnight delivery service, to the parties at their addresses on file with the Company, or at such other address as they shall from time to time specify in writing.

13.3 Partial Invalidity. If any term, covenant, or condition of this Agreement or its application to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such term, covenant or condition to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be effected thereby. Each term, covenant or condition of this Agreement shall be valid and enforced to the fullest extent permitted by law.

13.4 Non - Assignability. This is a personal services contract which cannot be assigned by any party.

13.5 Incorporation. This Agreement is one of the documents executed at the Closing as part of the transaction governed by the Joint Venture Master Agreement. This Agreement does not supersede, replace or abrogate any provision of the Joint Venture Master Agreement or any other document executed as part of the transaction governed by the Joint Venture Master Agreement. Any inconsistency between this Agreement and any other such document as to any facet of Young's employment by the Company, SPELLC, and NABGLLC shall be governed by this Agreement. All provisions of the Joint Venture Master Agreement and other documents executed as part of the transaction governed by the Joint Venture Master Agreement survive execution of this Agreement.

13.6 Entire Agreement. Except for those documents referred to in Section 13.6 or specifically referenced elsewhere in this Agreement, whose applicable provisions are incorporated as if set forth herein, this Agreement shall constitute the entire agreement of the parties with respect to its subject matter. All prior agreements, statements, or representations between the parties and their agents and/or employees, whether written or oral, are expressly merged herein and, if not contained in this Agreement, are of no force or effect. This Agreement shall not be modified, changed, altered, or discharged whatsoever, except by an agreement in writing executed by all parties hereto.

13.7 Applicable Law. This Agreement shall be governed by and construed according to the laws of the State of Michigan, and applicable provisions of federal law.

13.8 Successors. The covenants, conditions and agreements made and entered into by the parties hereto shall inure to the benefit of and shall be binding upon their respective heirs, successors, representatives and assigns.

IN WITNESS WHEREOF, the parties have signed and delivered this Employment Agreement as of the date indicated on page 1.

/s/ _____
Ernest I. Young

SPECIAL PLASTIC PRODUCTS L.L.C., a Michigan limited liability company

By: /s/ _____
Stewart Brannen

Its: Manager

NAB GROUP L.L.C., a Michigan limited liability company

By: /s/ _____
Stewart Brannen

Its: Manager

SPECIAL PRODUCTS ENGINEERING L.L.C., a Michigan limited liability company

By: ITS MEMBER, THE SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS

By: /s/ _____
Stewart Brannen

Its: _____Manager_____

WITNESSES:

/s/ _____

/s/ _____

APPENDIX L

JOINT VENTURE MASTER AGREEMENT

[Dated December 15, 1994]

THIS AGREEMENT, made as of this 15th day of December, 1994, by and among SPP, INC., a Michigan corporation ("Special"), **ERNEST I. YOUNG** ("Young"), and the **SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS** (the "Tribe"), a federally recognized Indian tribe organized under federal law, doing business as the **SAULT STE. MARIE TRIBE ECONOMIC DEVELOPMENT COMMISSION**, the ("EDC"), an entity chartered to do business by and for the Tribe.

WITNESSETH:

Special, Young and the EDC have agreed to form a Joint Venture composed of at least two Limited Liability Companies for the purpose of developing, manufacturing and supplying plastic parts and products to end use manufacturers. They desire to specify the terms of that joint venture in this Agreement.

NOW, THEREFORE, in consideration of the mutual agreements herein set forth, the adequacy and receipt of consideration being acknowledged, Special, Young and the EDC agree, covenant and promise as follows:

1. **Joint Venture Companies.** The parties shall form and operate at least three separate Limited Liability

Companies, described below, for this Joint Venture. The EDC and Young shall each own 50% of SPPLLC and NABGLLC.

A. **SPPLLC.** An operating company named Special Plastic Products L.L.C. ("SPPLLC"), Special is currently engaged in the business of developing, manufacturing and supplying plastic parts and products to end use manufacturers ("the Business"). SPPLLC shall continue and expand upon the operations of Special.

B. **NABGLLC.** The second company, named NAB Group L.L.C. ("NABGLLC"), shall own the land, manufacturing facility, and improvements ("the Plant") to be acquired by the Joint Venture, and any other real property acquired by the Joint Venture. NABGLLC will lease the Plant and other facilities to SPPLLC pursuant to a net lease, and pay the mortgage on any such acquired properties.

C. **SPELLC.** A third company, named Special Products Engineering L.L.C. ("SPELLC"), shall engage in engineering operations in conjunction with the conduct of business by SPELLC. SPELLC shall be owned one-half by the EDC, and one-half by Young.

These three entities are referred to in this Agreement collectively as the "Companies", or singularly as a "Company".

2. **EDC Contribution.** As consideration for ownership of 50% of the Companies, the EDC shall pay

$1,069,000 at Closing as a capital contribution to SPPLLC, in cash, certified check or immediately available funds. This EDC Contribution shall be held by SPP in a separate bank account, to be applied to the cost of constructing the Plant. The EDC will receive reasonable notice of expenditures from this account.

3. **EDC Loan.** In addition to the foregoing investment, the EDC shall advance up to $1,325,000 to SPPLLC and/or NABGLLC, pursuant to the terms of the parties' separate Loan Agreement and subject to these terms and conditions:

3.1 **Expansion Loan.** Up to $1,000,000 shall be used to construct and develop a new industrial facility to be occupied by SPPLLC, pursuant to plans and specifications approved by the EDC.

3.2 **Transaction Costs Loan.** Up to $325,000 shall be applied to pay liquidation taxes, repayment of the Officer Note shown on Special's August 31, 1994 Financial Statement (to the extent of the Officer's actual tax liability), and other costs of this transaction, including professional fees.

3.3 **Advances.** The advances shall be made as and when the various obligations covered by the loan are incurred, and shall be paid within 15 days after request is made for them by Young. The advances shall be a loan to SPPLLC and/or NABGLLC, subject to the repayment terms stated in the Loan Agreement.

3.4 **Repayment of Transaction Costs Loan.** The transaction cost loan shall be a line of credit available for

advances until 2004. Each advance shall be repaid within three years. Each advance drawn on or before December 31, 1995 shall accrue 8% annual interest; all advances made after that date shall bear interest at the prime rate established by Michigan National Bank for southeastern Michigan (or a reasonable substitute if such rate is no longer published), plus ½%. The repayment obligation shall not depend upon the profitability of SPPLLC.

3.5 Repayment of Expansion Loan. The expansion loan shall be repaid at 8% interest beginning in 1995. Interest on the loan shall be repaid regardless of the profitability of SPPLLC. Interest only shall be paid in quarterly installments beginning January 1, 1995. Principal shall be repaid from the distributed net cash flow of SPPLLC and NABGLLC each year as follows:

(a) Payments shall be made within 90 days after the end of each fiscal year, beginning after fiscal year 1995;

(b) No less than 66.67% of the distributed net cash flow shall be applied to Expansion Loan principal, up to a maximum of $400,000, plus any amount carried forward from previous years under subparagraph (c); and

***

SPPLLC shall continue the Business from the plant in Fair Haven, Michigan. Special has already purchased land in Pontiac, Michigan on which to locate and construct the Plant, and efforts to construct the Plant shall continue unabated

following Closing. It is the intent of The parties to begin operations from the Plant by the end of 1994, and they shall employ their reasonable best effort to do so. When the Plant is prepared and approved for occupancy, SPPLLC will adequately equip and staff that Plant so as to begin and continue operations from that facility. SPPLLC may also retain a portion of its operations at the Fair Haven plant.

9. **Implementation.** The promises and agreements of the parties are further conditioned upon and subject to the terms and provisions of the following documents to be executed and delivered at Closing:

A. Operating Agreements. Separate Operating Agreements for each of the three Companies, which will provide for centralized management of each of the Companies by a Board of Managers (with Young serving as CEC), provide other terms restricting transfer of Member interests, allocation of depreciation to Young, and control the governance of each Company. These Agreements will include suitable provisions for appointment of two Managers each by Young and the EDC, and of a fifth neutral Manager to avoid and resolve deadlocks. However, EDC shall appoint the fifth Manager for so long as any of the following events are uncured:
(i) failure to pay a minimum payment specified in Section 3.5(c) above within 60 days of its due date, (ii) default in the payment of Expansion Loan interest or the Transaction Cost Loan for a 180 consecutive day period, and (iii) any time the EDC's sharing ratio exceeds 60% under an adjustment, but correcting for depreciation allocations.

B. Young Employment Agreement. Young shall be employed as Chief Executive Officer of each of the Companies for at least a five year term, under the direction and supervision of their respective Management Boards, at compensation of $142,000 per year plus benefits, bonus of 2% for gross sales exceeding $12,500,000 in 1995, and for 1996 and thereafter 2% of the amount by which the year's gross sales exceeded the previous year's gross sales, plus expenses, and upon the other conditions stated in an Employment Agreement.

C. Transfer Documents. All documents necessary to effectuate the transfer of the Transferred Assets and Assumed Liabilities to SPPLLC from Young and Special.

D. Articles. The parties shall execute Articles of Organization for each of the Companies, and all other necessary papers to be filed, including reservation of the name for the Companies.

E. Loan Agreement. A Loan Agreement incorporating the terms summarized in Section 3, together with appropriate notes and security agreements.

F. Young's Agreement. Young will deliver and execute to the EDC and the Companies a non-compete agreement, a confidentiality agreement, an invention agreement (excepting those matters unrelated to the business of SPPLLC), and an agreement not to participate in any outside ventures without prior

approval of the Company Managers appointed by EDC.

10. Good Faith Payment. In consideration of this Agreement and Young's undertaking to continue and implement the transactions and acts contained in it, the EDC has paid to Young a non-refundable payment of $2,500. In the event this transaction is closed in accordance with Section 11, the payment shall be applied toward that payment made by the Tribe under Section 2. If the transaction is not consummated in accordance with Section 11, and the same is not due to the default of the EDC, the good faith deposit will be returned to the EDC. Young may retain the good faith deposit if the transaction is not consummated due to the default of EDC.

11. Closing Matters.

11.1 Closing Date & Place. Within 12 days after execution and delivery of this Agreement, the parties shall consummate the terms of this Agreement at the offices of R. Bradley Lambert, P.C., 600 South Adams, Suite 210, Birmingham, MI 48009.

11.2 Transaction at Closing. The following transactions and acts shall be undertaken at the Closing.

(a) EDC shall pay the contribution specified in Section 2.

(b) The proper parties shall execute and deliver Promissory Notes, Security Agreements and Loan Agreement for the advances specified in Section 3.

(c) Young and Special shall deliver to EDC a Contribution Agreement and Bill of Sale transferring the assets of Special.

(d) Each of the parties shall provide documents affirming their warranties and representations made in this Agreement, and affirming their authority to enter into the transactions contemplated in this Agreement.

(e) The parties shall execute and deliver those documents

***

or under other implementing documents, without the need for loans or financial assistance from any source external to the Tribe or the EDC.

13.10 Michigan Forum. This Joint Venture and the transactions contemplated herein are being consummated wholly within the State of Michigan.

14. Remedies.

14.1 Notice of Default. In the event of a default by the EDC in making the contributions specified herein or timely proceeding to Closing, by Young and/or Special in undertaking those contributions and actions specified herein, or by any party in failing to perform as provided in this Agreement, the aggrieved party shall provide the defaulting party with written notice declaring that default, and if such default is not cured within ten (10) days after notice is sent,

the aggrieved party may pursue a remedy as provided in this Section.

14.2 Arbitration.

(a) Any controversy or claim arising out of or relating to this Agreement, or the breach of this Agreement, shall be resolved by arbitration administered by the office of the American Arbitration Association located in Oakland County, Michigan, in accordance with its then current commercial arbitration rules. Except as provided in sub. (b), arbitration shall be the exclusive remedy of the parties. Judgment upon the award rendered by the arbitration may be entered in any court having jurisdiction.

(b) Notwithstanding sub. (a), any party shall have the right to pursue provisional or ancillary remedies (such as injunctive relief, attachment or appointment of a receiver), or to seek specific performance, from any court having jurisdiction. The pursuit of such remedies shall not constitute a waiver of the party's right to submit the same matter to arbitration, as to monetary damages or other non-equitable relief.

14.3 Waiver of Sovereign Immunity and Consent to Suit. The EDC hereby waives its immunity from suit to enforce the provisions of this Agreement, and all Agreements executed and delivered at the Closing and/or pursuant to this

Agreement, and consents to the exercise of jurisdiction over such suit by any court which may have jurisdiction over the subject matter, subject to the following conditions and limitations:

(a) the waiver is granted solely to the parties and the Companies, their representatives, agents, trustees, successors, and assigns, and does not extend to third parties;

(b) the governing law shall be the law of the State of Michigan;

(c) the waiver shall extend only to the enforcement of the obligations of the EDC under this Agreement (including the agreement to arbitration), or to damages for breach of this Agreement by the EDC;

(d) this waiver shall expire six years after the termination of the Companies or successor entities; and

(e) the waiver shall be enforceable solely against the assets of the EDC, as provided in Sault Ste. Marie Tribal Code § 40.108(1).

The EDC has approved this waiver by resolution. The resolution and Tribal Code § 40.108 are attached in Exhibit T.

15. **Conditions Precedent to Closing.** The parties intend to proceed with Closing. The obligation of the parties

to consummate the transactions contemplated by this Agreement is subject to the fulfillment (or waiver by the other party) before or at Closing of each of the following conditions:

15.1 Accuracy of Representations and Warranties. There shall be no material adverse departure from any representation and warranty of the parties as of the Closing date.

15.2 Completion of Closing Documents. The parties shall have agreed to the documents (and terms thereof) to be delivered at Closing, but each party shall be obligated to act in good faith and expend its reasonable best efforts to reach accord on such documents prior to the scheduled closing.

15.3 Performance of Covenants. The parties shall have in all respects performed and complied with all covenants, agreements, and conditions that this Agreement and all related documents required to be performed or complied with before or on the Closing Date. However, if such condition or non-performance may be met, cured or secured by the payment of money, the non-performing party may require the other party to proceed to closing by paying such sum as security or otherwise to allow for completion of the obligation post-closing.

15.4 No Casualty. Prior to the Closing date, Special shall not have incurred or be threatened with a material liability, or casualty exceeding the limits of insurance coverage, that would materially impair the value of the Transferred Assets.

APPENDIX M

TRIBAL CODE

CHAPTER 44:

WAIVER OF TRIBAL IMMUNITIES AND JURISDICTION IN COMMERCIAL TRANSACTIONS

CONTENTS:

44.101	Purpose and Authority	44-2
44.102	Findings and Declarations	44-2
44.103	Definitions	44-3
44.104	Sovereign Immunity of Tribe	44-4
44.105	Waiver of Sovereign Immunity of Tribe	44-4
44.106	Sovereign Immunity of Tribal Entity	44-4
44.107	Waiver of Sovereign Immunity of Tribal Entity	44-5
44.108	Waiver of Tribal Court Jurisdiction	44-5
44.109	Vesting of Contract Rights	44-6
44.110	Applicability and Effective Date	44-6

HISTORY NOTE:

Current Ordinance:

Adopted by Tribal Resolution No. 8-11-92-C, August 11, 1992, effective immediately. Reenacted as part of the Tribal Code July 5, 1995, Resolution no. 95-89.

TRIBAL CODE

CHAPTER 44:

WAIVER OF TRIBAL IMMUNITIES AND JURISDICTION IN COMMERCIAL TRANSACTIONS

44.101 Purpose and Authority.

The purpose of this Chapter is to provide for the waiver of Tribal Court jurisdiction and sovereign immunity in those commercial transactions for which such waiver is necessary and beneficial to the Tribe. This Chapter is enacted pursuant to the authority contained in Article VII, Section 1 (d), (g), (k), (l), (m), and (n) of the Tribal Constitution.

44.102 Findings and Declarations

The Board of Directors hereby finds and declares that:

(1) The Tribe and Tribal members benefit from commercial transactions conducted within the mainstream of the local and national economy, and the Tribe has become increasingly successful and sophisticated in such commercial transactions.

(2) Tribal sovereign immunity, an aspect of Tribal sovereignty, is an important protection for Tribal assets and resources, but it can at times be an impediment to commercial transactions. Many potential business partners of the Tribe are reluctant to enter into contracts unless Tribal sovereign immunity is waived, thereby allowing recourse in the event of tribal default or breach of contract. The Tribe finds it

necessary and desirable to waive its sovereign immunity from time to time in a prudent and limited manner in order to consummate business transactions of benefit to the Tribe and its members.

(3) Federal courts, spurred by recent decisions of the United States Supreme Court, have been enforcing a requirement that a party exhaust its Tribal Court remedies for actions against the Tribe or Tribal members arising on the reservation before availing themselves of federal or state court. As with Tribal sovereign immunity, however, many potential business partners are reluctant to enter commercial transactions with the Tribe if they believe their Tribe finds it necessary and desirable from time to time to waive Tribal Court jurisdiction over particular commercial transactions.

(4) The Tribe has the authority to waive its sovereign immunity, provided it does so knowingly in express terms. Likewise, the Tribe has the constitutional authority to define the jurisdiction of the Tribal Court, and it can waive Tribal Court jurisdiction in a way that is contractually binding in the future if it does so in clear and unmistakable terms. The Tribe possesses the necessary experience, expertise and sophistication to determine when such waivers are in the best interests of the Tribe.

(5) The Tribe has chartered and will continue to charter subordinate Tribal entities, such as the Housing Authority and the Economic Development Commission, which function autonomously for the most part within their spheres of authority. These Tribal entities are of economic benefit to the Tribe and often have need of authority to waive their own immunity to facilitate commercial transactions.

(6) Any waiver of Tribal Court jurisdiction or sovereign immunity made pursuant to this Chapter is hereby declared to be in the best interests of the Tribe and its members. Such waiver does not infringe upon Tribal sovereignty, but instead is an affirmative expression and exercise of such sovereignty.

44.103 Definitions.

As used in this Chapter:

(1) "Board of Directors" means the Board of Directors of the Tribe, the Tribe's governing body duly elected pursuant to the Tribal Constitution.

(2) "Charter" means the organic document of a Tribal entity, and includes the Housing Authority Ordinance, Tribal Code Chapter 90, and the Economic Development Commission Charter, Tribal Code Chapter 40, and any approved articles of incorporation.

(3) "Tribal Entity" means any entity created and owned by the Tribe for economic or governmental purposes and any entity which is controlled by the Board of Directors. For purposes of this Chapter, an entity shall be deemed to be controlled by the Board of Directors if a majority of the persons serving on the body which governs the entity are chosen by the Board of Directors or are required to be members of the Board of Directors. Entities governed by this Chapter include, but are not limited to, the Housing Authority, the Economic Development Commission, and other organizations entitled or denominated 'authority,' 'enterprise,' 'corporation,' 'agency,' 'commission,' or terms

of like import; provided, however, that committees of the Board of Directors shall not be deemed Tribal entities for purposes of this Chapter.

(4) "Tribal Court" means the Sault Ste. Marie Chippewa Tribal Court established by Tribal Code Chapter 80.

(5) "Tribe" means the Sault Ste. Marie Tribe of Chippewa Indians.

44.104 Sovereign Immunity of Tribe.

The sovereign immunity of the Tribe, including sovereign immunity from suit in any state, federal or tribal court, is hereby expressly reaffirmed unless such immunity is waived in accordance with § 44.105. A "sue and be sued" clause or other authorization for a Tribal entity to waive its own sovereign immunity shall not constitute authorization for waiver of the immunity of the Tribe itself. Except for a charter provision expressly authorizing a Tribal entity to waiver the sovereign immunity of the Tribe itself, such as that contained in the Economic Development Commission Charter, Tribal Code § 40.108, nothing in a Tribal entity charter shall be deemed or construed to be a waiver of the sovereign immunity of the Tribe or the consent of the Tribe to suit in any forum.

44.105 Waiver of Sovereign Immunity of Tribe.

(1) The sovereign immunity of the Tribe may be waived:

(a) by resolution of the Board of Directors expressly waiving the sovereign immunity of the Tribe and consenting to suit against the Tribe in any forum designated in the resolution; provided, that such waiver shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds of the Tribe subject to the waiver, court having jurisdiction and applicable law. Such waiver shall be subject to any conditions or limitations set forth in the resolution; or

(b) by a Tribal entity exercising authority expressly delegated to such entity in this charter or specially by resolution of the Board of Directors; provided, that such waiver shall be made in strict conformity with the provisions of the charter or resolution governing such delegation.

(2) No express waiver of sovereign immunity by resolution shall be deemed a consent to the levy of any judgment, lien or attachment upon property of the Tribe other than the property specifically pledged, assigned or identified in the resolution.

44.106 Sovereign Immunity of Tribal Entity.

A Tribal entity is endowed by federal law and the provisions of this Chapter with all the privileges and immunities of the Tribe, except as specifically limited in the

charter of the Tribal entity. This includes sovereign immunity from suit in any state, federal or tribal court.

44.107 Waiver of Sovereign Immunity by Tribal Entity

(1) The sovereign immunity of a Tribal entity may be waived:

(a) by a "sue and be sued" clause or other express waiver in the charter of the Tribal entity; or

(b) by express resolution of the governing body of the Tribal entity.

(2) Waivers of sovereign immunity by resolution shall be granted only when necessary to secure a substantial advantage or benefit to the Tribal entity or the Tribe. Waivers of sovereign immunity by resolution shall not be general but shall be specific and limited as to duration, grantee, transaction, property or funds of the Tribal entity subject to the waiver, court having jurisdiction and applicable law.

(3) Neither a "sue and be sued" clause nor an express waiver of sovereign immunity by resolution of the Tribal entity shall be deemed a consent to the levy of any judgment, lien or attachment upon the property of the Tribal entity other than the property specifically pledged, assigned or identified in the resolution, or of any property of the Tribe.

44.108 Waiver of Tribal Court Jurisdiction

(1) The Board of Directors may waiver by resolution the jurisdiction of the Tribal Court over any claim or cause of action which arises out of a commercial transaction involving the Tribe, a Tribal entity, or a Tribal member, if all of the following conditions are met:

(a) the commercial transaction is specifically identified in the resolution; and

(b) the resolution contains factual findings supporting the conclusions that:

(i) the waiver is in the best interests of the Tribe, the Tribal entity or the Tribal member; and

(ii) the transaction could not be consummated without such waiver.

(2) Any waiver of Tribal Court jurisdiction made in accordance with this section shall be presumed to constitute a waiver of Tribal Court jurisdiction in clear and unmistakable terms and shall not constitute an infringement upon Tribal sovereignty.

44.109 Vesting of Contractual Rights.

Any waiver of sovereign immunity or of Tribal Court jurisdiction by resolution as provided in this Chapter may be incorporated in the contract documents governing the transaction involved. When so incorporated in the contract documents governing the transaction involved. When so

incorporated, it is the intent and purpose of the Tribe that there is created a vested contractual right to the waiver which cannot be impaired or abrogated by the later repeal or amendment of this Chapter or of any resolution containing a waiver of sovereign immunity or Tribal Court jurisdiction adopted in conformity with this Chapter, or any other Tribal action inconsistent with the waiver shall not repeal, modify, abrogate or impair any provision of a contract containing a waiver of sovereign immunity or Tribal Court jurisdiction incorporated in such contract pursuant to this section.

44.110 Applicability and Effective Date.

This Chapter shall take effect immediately upon its enactment by resolution of the Board of Directors. It shall have prospective application only and shall not apply to or limit any waiver made by the Tribe or a Tribal entity acting within the scope of its authority prior to the effective date of this Chapter.